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ABSTRACT

A comprehensive description, using nonlegal terminology, is presented of the Title I legal framework pertaining to the requirements school districts must satisfy to receive assistance under Title I (eligibility and targeting of children, and school attendance areas, program design, concentration, comparability, supplanting, and parent involvement). Also covered are functions performed by State Educational Agencies (application approval, technical assistance, monitoring, and enforcement) and functions performed by the Commissioner of Education (approval of state plans, rulemaking, technical assistance, monitoring, auditing, and enforcement).

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PART I

INTRODUCTION AND OVERVIEW OF THE PAPER

I. Purpose of the Paper

On April 11, 1965, Congress enacted the Elementary and Secondary Education Act[1] (ESEA) which was designed to expand educational opportunities in the nation's elementary and secondary schools. "Title I"[2] of that Act provides financial assistance to local educational agencies[3] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Later amendments have "set aside" certain amounts of Title I funds for handicapped children,[4] Indian children,[5] agricultural migrant children,[6] children in institutions for the neglected and delinquent children,[7] and children of migratory fishermen.[8]

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[1] P.L. 89-10 (20 U.S.C. 241a *et. seq.*)

[2] "Title I" of ESEA was originally designated "Title II" of P.L. 81-874 (1950) pertaining to Federal aid to impacted areas. In January, 1968 Congress redesignated the enabling legislation as Title I of ESEA.

[3] The term "local educational agency" means a "public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or such combination of school districts or counties as are recognized ina State as an administrative agency for its public elementary or secondary schools . . ." Section 403 (6)(B) of P.L. 81-874.

[4] P.L. 89-313 (November 1, 1965).

[5] P.L. 89-750 (November 3, 1966).

[6] *Id.*

Congress, in the Education Amendments of 1974 (1974 Amendments), extended the Title I program through June 30, 1978. The 1974 Amendments also mandated that the National Institute of Education (NIE) undertake a study of compensatory education programs, including Title I and report their findings to Congress with recommendations concerning future federally funded compensatory and remedial education programs.

One aspect of the NIE study[9] is an examination of the administration of Title I by State Educational Agencies[10] (SEAs). Central to the study of program administration and to any conclusions concerning the future of federal compensatory education efforts is an understanding of the legal framework of Title I. This legal framework includes program requirements which specify how Title I programs are to be designed and how federal funds are to be used by LEAs which receive Title I funds, thereby defining the objectives of Title I program administration. The legal framework also includes the respective functions which SEAs and the United States Office of Education (OE) are to perform in the administration of Title I. The National Institute of Education has contracted with the Lawyers' Committee for Civil Rights Under Law to conduct the "Compensatory Education Sutdy - Survey of Legal Standards" (Legal Standards Project) which is to describe and analyze the legal framework of Title I and State compensatory education programs.

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[7] Id.

[8] P.L. 93-380 (August 21, 1974).

[9] Section 821 of the 1974 Amendments (20 U.S.C. 1221c note). See Research Plan: Compensatory Education Study (December 16, 1974) National Institute of Education.

[10] The term "State educational agency" means the officer or agency primarily responsible for the state supervision of public elementary and secondary schools. Section 403(7) of P.L. 81-874.

The study's basic research objective was to determine what additions, deletions, or clarifications are needed to the Title I legal framework to improve program administration.

The Project's analysis of Title I began in July, 1975. Our first task was to compile and analyze the following documents:

- Title I statute
- General Education Provisions Act (GEPA)
- legislative history (committee reports and floor debate)
- current Title I and GEPA regulations
- old Title I regulations
- Title I Program Directives (Program Guides)
- OE program support packages and handbooks
- internal OE memoranda
- OE correspondence with states and local school districts

Based on our analysis we prepared a paper entitled, "A Description of Title I, ESEA Legal Framework and Preliminary Analysis of the LEA Program Requirements". Upon completion of this paper, we commenced the second stage of our project. NIE felt that it was important to address the basic research objective by surveying the manner in which ten states interpreted the Title I requirements.

The project reviewed written policy statements developed by the states, and preliminary determinations were made concerning, among other things, (a) the substance and extent of state regulations, and (b) the comprehensiveness, internal consistency, and specificity of these state regulations, and their consistency with the federal legal framework.

In addition to studying the states' legal frameworks, we spent approximately one week in each state interviewing a wide range of state officials responsible for the administration of Title I, including State Title I Directors, their staffs, State Auditors, and legal counsel. These interviews were conducted between December, 1975 and March, 1976.

During the interviews conducted in the ten states we attempted to determine: (a) the accuracy of our preliminary analysis; (b) state interpretations concerning areas which, based on a preliminary reading of the Title I statute, regulations, guidelines, and handbooks might be thought to be ambiguous; (c) perceived problems with the legal framework; and (d) areas which SEAs felt were most important to the effectuation of the purposes of Title I.

In satisfaction of the study's basic research objective, the Project prepared policy papers analyzing (a) the basis for and clarity and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I; 11/ (b) the adequacy of the federal legal framework with respect to the administrative oversight responsibilities State Educational Agencies are required to perform; 12/ and (c) the relationship between Title I and selected state compensatory education programs. 13/

11/ Silverstein, Robert, and Daniel M. Schember. An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act. (Lawyers' Committee for Civil Rights Under Law, September 1977); See also Silverstein, Robert. An Introductory Overview Concerning the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I, ESEA. (Lawyers' Committee for Civil Rights Under Law, September 1977).

12/ Gaffney, Michael, Catherine Thomas, and Robert Silverstein. An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965. (Lawyers' Committee for Civil Rights Under Law, September 1977).

13/ Silverstein, Robert, Patricia J. Gauvey, David Long, Carol Morgan, Daniel M. Schember. A Description and Analysis of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs. (Lawyers' Committee for Civil Rights Under Law, September 1977).

Each paper contains, with respect to the topics it discusses:

(1) a description of the major applicable legal requirements (using non-legal terminology);

(2) an explanation of the purpose of each requirement, including references to relevant portions of the legislative and regulatory history;

(3) an analysis of the interrelationships among requirements;

(4) examples of policies developed by ten states;

(5) model questions for Title I application forms; application checklists; and monitoring instruments;

(6) recommendations for improving the clarity of the regulations and reducing the restrictive aspects of Title I.

Although the policy papers described above concern different aspects of the Title I legal framework, we did reach several general conclusions. First, with few exceptions, the overall structure of Title I is sound, i.e., the existing requirements set forth in the statute and regulations maximize the likelihood that the Title I funds will satisfy the legislative purpose of providing financial assistance to local school districts to expand and improve the educational programs for educationally deprived children residing in low-income areas. Second, OE's interpretations (a) are generally consistent with the statute, (b) are internally consistent, i.e., complying with one requirement does not require contravening a second requirement, and

(c) permit maximum flexibility consistent with the legislative purpose of Title I. Third, the regulations contain general statements of policy but do not explain how these policies are to be applied in commonly occurring situations; instead these explanations appeared in guidelines and handbooks and correspondence, (which have been officially superseded) [14] and in OE letters with SEAs (which have not been widely disseminated). Thus, we concluded that the regulations are not sufficiently clear, i.e., states and local school districts do not understand the range of acceptable and unacceptable practices under Title I. One of the major effects of this lack of clarity is that some state and local school districts are pursuing overly restrictive practices not prescribed by Title I. We concluded that increased clarity in the regulations would result in increased awareness by LEAs of the flexibility which the legal framework grants them in designing Title I programs.

In light of these findings NIE concluded it was important for the Project to prepare a sixth paper describing the applicable standards contained in the statute, regulations and other generally disseminated documents as well as the interpretations (explaining the application of the legal standards to commonly occurring situations) contained in those documents which (a) have been superseded and (b) have not been widely circulated.

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[14] See infra, p. 13.

In sum, the purpose of this sixth paper is to present a comprehensive description (using non-legal terminoligy) of the Title I legal framework pertaining to

- the requirements school districts must satisfy to receive assistance under Title I (e.g., eligibility and targeting of children and school attendance areas, program design, concentration, comparability, supplanting, and parent involvement);
- functions performed by State Educational Agencies (e.g., application approval, technical assistance, monitoring, and enforcement); and
- functions performed by the Commissioner of Education (e.g., approval of state plans, rulemaking, technical assistance, monitoring, auditing, and enforcement).

II. Definitions of Major Terms

A. Introduction

Throughout the paper, reference is made to certain terms describing the federal documents pertaining to the Title I and GEPA requirements. These terms are defined below.

B. The "Federal" or "Title I Legal Framework"

For purpose of this paper the federal or Title I legal framework includes all documents constituting the "formal" and "informal" legal framework. These terms are defined immediately below.

C. The "Federal Formal Legal Framework"

Whenever Congress enacts new legislation distributing federal funds, a formal legal framework must be developed to specify the requirements and conditions governing the receipt of benefits under the legislation. For purposes of this paper, the Title I "formal legal framework" includes the requirements appearing in the Title I legislation (Title I) and the General Education Provisions Act (GEPA), as well as the regulations officially promulgated by OE which were originally published in the Federal Register (FR) and subsequently codified in the Code of Federal Regulations (C.F.R.). A regulation is a general rule issued by a government agency pursuant to an Act of Congress delegating such "rulemaking" authority to the agency. These regulations are considered to have the "full force of law." [15] This means that a requirement issued as a regulation is as legally binding as a federal statute -- so long as it is within the scope of the agency's delegated power.

In the paper there are references both to "regulations" and to "proposed regulations." The distinction can be explained by describing the process by which a regulation is promulgated. Under the General Education Provisions Act (GEPA) all Title I regulations must first be published in the Federal Register as proposed regulations.[16] During the thirty-day period following this publication, the United States Commissioner of Education (Commissioner) must offer interested persons an opportunity to comment upon the proposed regulations. Following the thirty-day comment period the Commissioner may (a) decide not to adopt the proposal as a final regulation; (b) adopt the proposed regulation in a modified form; or (c) finally adopt the regulation as originally proposed, without modification.

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[15] See Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942). Regulations having the "full force and effect of law" are commonly referred to as "legislative rules". See Davis, Administrative Law Text (West 1972) at p. 126.

If the agency decides to adopt a regulation as final, either as originally proposed or as modified, it must republish the regulation in the Federal Register. Once each year, the regulations which have finally been adopted by OE are republished in Title 45 of the Code of Federal Regulations (cited as 45 C.F.R.).

In sum, the Federal Register is generally used by federal agencies to publish both proposed regulations and finally adopted regulations. The Code of Federal Regulations contains only the finally adopted regulations.

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[16] Section 431 of GEPA (20 U.S.C. 1232). The term "regulation" in accordance with the Education Amendments of 1976, is defined in Section 431 of GEPA to include "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication in the Federal Register of a regulation, must transmit to Congress a copy of the regulation which will generally become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

In addititon to the statute and regulations, the formal legal framework in effect prior to the date the revised regulations became effective included "criteria" developed by OE which appeared in program guides issued by OE (renamed "Program Instructions", these guides were part of OE's Program Directive System). Although these guidelines were widely disseminated, they were never published in the Federal Register. [17]

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[17] It should be noted that the legal status of these old guidelines was uncertain in light of Section 503 of P.L. 92-318 and Section 431 of GEPA. Section 503 provides, among other things, that OE conduct a "study" of all published policy pronouncements, including OE "criteria" or guidelines, and then publish the results of this study in the Federal Register. This study was to be completed in 1973. As explained supra, Section 431 of GEPA (20 U.S.C. 1232) generally provides that (1) all "regulations" must be published in the Federal Register; (2) the public must be provided with a 30-day comment period; (3) these regulations must be republished in the Federal Register; and (4) Congress must be given a 45-day period to review them before they go into effect.

Faced with questions concerning the legality of unpublished agency circulars and pronouncements containing mandatory language, the courts have generally concluded that the requirements are binding on state and local agencies with actual notice of them, in keeping with §552(a) of the Administrative Procedure Act (5 U.S.C. §501 et. seq.). See, e.g., Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1970); Hike v. Carter, 448 F. 2d 798, 803 (8th Cir. 1971); Kessler v. F.C.C., 326 F. 2d 673, 689-90 (D.C. Cir. 1963); Section 552 provides, in relevant part, "except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter to be published in the Federal Register and not so published."

[Footnote continues]

(footnote continued from previous page)

In two Supreme Court cases involving DHEW, Wheeler v. Barrera, 417 U.S. 402 (1974) and King v. Smith, 392 U.S. 309 (1968), the court has relied heavily on "requirements" contained in DHEW handbooks. In Wheeler, for example, the court authoritatively cited the handbook entitled Title I ESEA: Participation of Private School Children (DHEW Publication No. (OE) 72-62, which quotes or paraphrases Program Guide No. 24 (cancelled in 1972) in a determination concerning "comparable services" to educationally deprived children in private schools.

Moreover, Courts unwilling to accord guidelines unpublished in the Federal Register an equal status with officially promulgated regulations, nonetheless might find them to be binding on SEAs and LEAs through the practice and policy of judicial deference to agency administrative interpretations. Agency interpretations and guidelines are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945).

With respect to those guidelines containing directory language, the suggestions are considered acceptable courses of conduct which will satisfy a legal requirement and presumably have the legal effect of protecting a recipient against audit exceptions if the recommended course of conduct is followed. This latter proposition assumes that the statements contained in the guidelines are not inconsistent with the statute or regulations. Courts have explained that agency interpretations may be disregarded, particularly where they are at variance with its own regulations' clear language or the clear language of the statute. See e.g., Frances v. Davidson, 340 F. Supp. 351, 365-66 (D.C., Md.), aff'd., 409 U.S. 904 (1972); Stork v. U.S., 278 F. Supp. 869, 871 (D.C. Cal. 1967), aff'd. 430 F.2d 1104 (1967).

These program criteria were based on the law, and served to clarify and further explain the regulations. The program guides also provided basic information about Title I, including technical information about fiscal administration and evaluation, and suggestions for meeting the legal requirements regarding program development.

According to the Preamble to the September 28, 1976 revised regulations, the "criteria" set forth in the guidelines were superseded on October 28, 1976, the date the revised regulations became effective. 18/

In sum, the Title I statute contains the basic requirements governing the operation of Title I programs and projects. The regulations incorporate and explain in greater detail the essential elements of the law. The OE "criteria" in effect prior to October 28, 1976 were based on the law and clarified and further explained the regulations. 19/ As explained *infra*, p. 15, for purposes of this paper, criteria which have been superseded will be considered part of the "informal legal framework."

18/ The Preamble states, in relevant part, that "All preceding rules, regulations, guidelines and other published interpretations and orders issued in connection with or affecting Part 116 will be superseded when this regulation becomes effective" (41 FR 42894).

19/ Of course, a regulation and OE-developed criterion which is inconsistent with the legislative requirements would not be valid.

The first set of regulations implementing Title I (P.L. 89-10, the Elementary and Secondary Education Act of 1965), were published on September 15, 1965. Since then they have been amended on March 11, 1966, February 9, 1967, November 28, 1968, October 14, 1971, and June 28, 1973, to incorporate the provisions of P.L. 89-313, 89-750, 90-247 and 91-230. Proposed regulations implementing P.L. 93-380 appeared in the Federal Register on March 11, 1975 (40 FR 11472). Final regulations were issued on September 28, 1976 (41 FR 42894).

The first set of criteria, dated April 14, 1967, was issued as Program Guide No. 36. It was revised and reissued within a one-year period on March 18, 1968, as Program Guide No. 44.

D. The "Federal Informal Legal Framework"

Since 1965, the year Title I was enacted, an informal legal framework has supplemented the formal legal framework.

For purposes of this paper, the "informal legal framework" 20/ includes statements of policy issued by OE construing the statute and rules which it administers. OE interpretations constituting the informal legal framework are set forth in such documents as:

- OE handbooks,
- OE program support packages,
- OE guidelines and regulations which have been cancelled or superseded,
- OE program "Notices" and "Instructions" contained in the Program Directive System,
- internal OE memoranda, and correspondence between OE and particular states, construing the statute, regulations, and guidelines.

20/ The term "informal legal framework" is synonymous with the legal term "interpretative rules". See Davis, Administrative Law Text (West 1972) at p. 126. In addition to performing the rulemaking function (an analysis of which is the focus of this paper), OE is required to monitor and enforce compliance with the rules (adjudicatory function). Periodically, OE sends review teams to each state to assess their competencies with respect to performance of specified administrative functions (for example application approval, monitoring and financial management). In addition, the HEW Audit Agency periodically audits the fiscal integrity of the grant transactions and compliance with the rules. The Title I adjudicative function generally includes (a) the refusal to approve annual plans submitted by states (these plans generally assure that they will faithfully administer Title I); (b) withholding of funds, and (c) recoupment of misspent funds alleged in the audits. Policy is communicated to interested parties in various ways, including for example, OE Review Team and HEW Audit Agency reports. This paper makes references to adjudicatory documents for the limited purpose of explaining the derivation or motivation behind a particular state policy.

III. Limitations of This Paper

There are several aspects of the Title I legal framework which are not considered in this paper. First, this paper does not describe those requirements pertaining to Title I programs funded from special Title I "set asides" for handicapped children, Indian children, agricultural migrant children, children of migratory fishermen, or children in state institutions for neglected and delinquent children. Nor does this paper consider those sections of the legislation and regulations which do not pertain directly to requirements which LEAs must meet or to functions which SEAs and OE are required to perform under Title I, e.g., special incentive grants, and the establishment of a National Advisory Council for the Educationally Disadvantaged.

Finally, this document should not be construed as constituting a definitive statement concerning official OE policy. As explained supra, OE stated in the preamble to the revised regulations published in the Federal Register on September 28, 1976 that "all preceding rules, regulations, guidelines and other published interpretations and orders... will be superseded when this regulation becomes effective." Recall further that all regulations (which include all interpretations) must be promulgated in accordance with a prescribed procedure requiring (a) publication in proposed form, (b) 30 day comment period, (c) republication in final form, and (d) submission to Congress. In light of OE's policy regarding old handbooks and guides and the procedural requirements in GEPA, the current legal status of the informal legal framework (to which we make frequent reference) is uncertain. Therefore, absolute reliance on this paper as a definitive statement of the current law would be unjustified. Only OE can publish a document constituting a definitive statement of current OE policy.

IV. Organization of This Paper

This paper is divided into four parts. Part I is the general introduction. Part II is the description of the requirements local school districts must satisfy to receive assistance under Title I (LEA Program Requirements). Part III is the description of the functions SEAs must perform to ensure proper and efficient administration of the program (SEA Administrative Functions). Part IV is the description of the functions which the United States Office of Education must perform (OE Administrative Functions).

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INTRODUCTION AND OVERVIEW OF THE LEA PROGRAM REQUIREMENTS

INTRODUCTION AND OVERVIEW OF THE LEA PROGRAM REQUIREMENTS

A. Declaration of Policy

Title I of the Elementary and Secondary Education Act (Title I) provides financial assistance to local educational agencies[21] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income areas.

In enacting Title I, Congress made the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children. [Emphasis added.][22]

Under the Title I legislation, the United States Commissioner of Education (Commissioner) makes payments to State educational agencies[23] (SEAs) "on the basis of entitlements created under this title."[24]

To determine the amount of a state's entitlement the National Center for Education Statistics computes basic grants based on the number of children from low-income families residing in each county in the state.[25]

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[21] See supra, note 3 for the definition of the term "local educational agency".

[22] Section 101 of Title I (20 U.S.C. 241a).

[23] See supra, note 10 for the definition of the term "State educational agency".

[24] Section 102 of Title I (20 U.S.C. 241b).

Once an SEA is notified of its total allocation for each county, it distributes the funds to those school districts submitting applications approved by the SEA.

Each application submitted by an LEA to an SEA for approval must contain specific assurances or demonstrate that the LEA will comply with particular Title I requirements.

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[25] All states are entitled to receive funds, and state entitlements are based on the number of children from low-income families residing in the state according to the most recent census and A.F.D.C. statistics as determined by the Commissioner. The original Title I formula was 50% (the "federal percentage") of the average per pupil expenditure in the state multiplied by the number of children (aged 5 to 17) from low-income families. The 1966 Title I amendments increased payments to low expenditure states by allowing the state or national per pupil expenditure to be used, whichever was higher. Low-income families were defined as those families with incomes below the poverty level ($2,000 as of 1966, $3,000 as of 1968, $4,000 as of 1972), plus those families with incomes above the poverty level receiving A.F.D.C. payments. In fact, the $2,000 level was used because Congressional appropriations have never been large enough to fund at a higher level. Congress mandated the use of 1970 census statistics as of July 1, 1972 (P.L. 91-230).

The 1974 Amendments (P.L. 93-380) altered the formula significantly: the state's per pupil expenditure is now multiplied by 40% and the per pupil expenditure level for any state is limited to a range of between 80% and 120% of the national average. The low-income factor is determined by the "Orshansky index" which adjusts the poverty level according to family size and farm/non-farm location. Additionall only two-thirds of the children from families receiving A.F.D.C. payments are now counted. The effect of these changes is to provide more aid to states with a high proportion of families below the "Orshansky index" of poverty and to decrease payments to urban areas where A.F.D.C. payments often put families above the "Orshansky index."

In the words of the Title I statute, funds provided under Title I must be used to expand and improve the educational programs for educationally deprived children in school attendance areas having high concentrations of children from low-income families. Title I programs must be designed to to meet the special educational needs of such children.[26]

Each of the above words and phrases from the statute has a special significance which forms the basis for a requirement or series of requirements that LEAs must satisfy to receive grants under Title I (LEA program requirements).

The basic LEA program requirements (1) specify the class of intended beneficiaries -- educationally deprived children residing in low-income areas (program focus); (2) specify the nature of Title I programs -- they must be designed to meet the special educational needs of such children (nature of program); (3) attempt to maximize the likelihood that Title I funds will be used effectively to meet the needs of such children, by requiring that programs be properly planned and designed (program planning provisions) and that funds be allocated only for programs intended to provide additional services (funds allocation provisions); and (4) provide a means for verifying fund and program accountability (accountability provision).

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[26] Section 101 of Title I (20 U.S.C. 241a).

Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A) (emphasis added).

B. Program Focus

Congress recognized that federal appropriations of Title I funds would generally not be sufficient to serve all educationally deprived children in a school district. To prevent dilution of Title I funds, Congress has decided to concentrate these limited resources in areas determined to be in greatest need of assistance; namely, areas having high concentrations of children from low-income families.

In order to ensure that Title I programs best meet the needs of the intended beneficiaries, i.e., "educationally deprived children" residing in areas "having high concentrations of children from low-income families", the regulations and guidelines issued by OE contain eligibility and targeting requirements. The eligibility requirements [27] specify the schools within a district eligible to receive funds and the children in those schools eligible to participate in Title I programs. In most school districts insufficient funds are available to design comprehensive programs for all eligible areas and for all eligible children. Since Congress has never fully funded Title I, funds have generally been insufficient in this regard since the inception of the program. The targeting requirements establish criteria for selecting, from the list of eligible schools and children, those that will actually participate in Title I programs.[28] In general the LEA must select those areas with the highest incidence of low-income families and within those areas, the educationally deprived children who are "most in need of assistance." The eligibility and targeting requirements also ensure that LEAs do not discriminate against children qualifying for Title I services, simply because those children attend private schools.

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[27] Id.; 45 C.F.R. §116.17(d)(1975) and 45 C.F.R. §116.17 (a)(1975) now at 45 C.F.R. §116a.20(1976) and 45 C.F.R. §116a.21(c)(1976).

[28] Program Guide No. 44, Section 4.6 and 45 C.F.R. §116.17(f)(1975), now at 45 C.F.R. §116a.20(c)(1976) and 45 C.F.R. §116a.21(e)(1976).

C. Nature of Program

The Title I legal framework presently requires that funds be used to meet the special educational needs of educationally deprived children residing in low-income areas. The present structure ensures that the focus of programs be educational although the legal framework clearly permits the use of Title I funds to pay for "auxiliary services," e.g., "health" or "welfare" services, to the extent such services are unavailable under other programs and support an educational objective. However, present requirements prevent Title I from being recast as a health or welfare program.

D. Program Planning Process and Parent Involvement

In order to ensure that Title I programs are "designed"[29] to meet the special educational needs of educationally deprived children in low-income areas, the regulations require LEAs to demonstrate in their applications for Title I funds that (a) they have undertaken a comprehensive assessment of the special needs of the eligible children (needs assessment);[30] (b) they have described the objectives of the projects in relation to the special needs identified in the needs assessment (program objectives);[31] (c) they have designed their program in accordance with the objectives of the project (program design);[32] (d) they have concentrated funds on a limited number of programs and projects, thereby increasing the likelihood of success in meeting the objectives of the project (concentration);[33] (e) they will evaluate the projects to determine whether the objectives of the project have been met (evaluation);[34] (f) they have coordinated efforts with other agencies concerned with the same target population (coordination);[35] (g) they have disseminated information concerning effective teaching strategies and techniques to Title I teachers (information dissemination);[36] (h) they have involved parents in the planning, implementation and evaluation of programs (parent involvement).[37]

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[29] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

[30] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.21(1976).

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[31] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.22 (a)(1)(1976) and §116a.22(b)(1)(1976).

[32] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.19(b) and §116a.22(1976).

[33] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)); 45 C.F.R. §116.18(a) and (e)(1975), now at 45 C.F.R. §116a.20(a and §116a.20(b)(1976). Concentration is closely related to the targeting requirements described above.

[34] Section 141(a)(6) and 141(a)(7) of Title I (20 U.S.C. 241e(a)(6) and (a)(7); 45 C.F.R. §116.22(1975), now at 45 C.F.R. §116.43(1976).

[35] 45 C.F.R. §116.24(1975); now at 45 C.F.R. §116.41(1976).

[36] Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10); 45 C.F.R. §116.25(a)(1975), now at 45 C.F.R. §116.44(a) (1976).

[37] Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14); 45 C.F.R. §116.16(o)(1974); now at 45 C.F.R. §116a.25(1976).

More specifically, the needs assessment requirement serves three purposes. First, absent a comprehensive assessment of children's needs, certain children residing in low-income areas who are in need of special assistance might be missed; whereas, parents of other children having less need for special assistance might successfully lobby for inclusion of their children in the Title I program. The needs assessment requirement enables LEAs to resist such pressures. Second, if it were not required to conduct a needs assessment, an LEA could use Title I funds to meet low-priority needs rather than the most pressing needs. Third, a needs assessment increases the likelihood that the educational strategies chosen will be effective. Knowledge of the specific needs of the children to be served is essential to the development of effective educational strategies addressing those needs.

Specific identification of program objectives establishes a clear direction for program activities. Thus, the formulation of objectives directly responsive to the needs identified in the needs assessment increases the likelihood that program activities will be relevant to identified needs of children. In addition, without objectives it is difficult, if not impossible, to determine whether a program has been successful since objectives establish the criteria against which success can be measured. It is also elementary that objectives encourage purposeful rather than aimless activity.

Similarly, the requirement that strategies be specifically formulated to accomplish program objectives is an important aspect of maximizing the relevance to pupil needs and the likelihood of success of Title I funded activities. This is nothing more than a requirement that (1) Title I programs be planned rather than determined merely by custom or inertia; and (2) that LEA staff use their best judgment to develop program strategies, e.g., regarding curriculum and resource development, that will accomplish previously identified objectives. Like the identification of objectives, this planning requirement provides a needed link between the needs assessment and the implementation of the program.

Advance planning of activities is designed to ensure balance and coordination among program components and to avoid the confusion and wasted energy that often accompanies inadequately planned activities. Most Title I programs require more than one staff member to implement. Advance planning can provide staff members with a clear picture of their roles in meeting objectives and prevent gaps and overlaps in the services provided.

The concentration requirement which is intended to increase program quality, is based on a simple premise: if funds are spread so thinly that children receive few extra services or only brief exposure to the services provided, little or no progress will be made. Decisions to limit the number of participants to ensure program effectiveness -- so that the services provided are likely to substantially increase the educational attainment of the children served are difficult and sometimes painful to make. The concentration requirement serves this important purpose. If the requirement did not exist, LEA officials might succumb to the pressures to "serve everyone" and implement numerous "pet projects". The coordination requirement is included in the Title I legal framework to avoid a duplication of benefits and to ensure the most effective and efficient use of Title I funds toward meeting the special educational needs of program participants.

The evaluation requirement also plays an important role in maximizing program quality. Evaluations determine whether Title I projects are succeeding but, more importantly, they provide valuable insights about how programs might be improved.

The parent involvement requirement is based on several premises. First, when parents are involved in the planning, implementation, and evaluation of a program for their children, there is a greater interest on the part of both parents and children in working toward the success of the program.[38] Second, there is a greater likelihood that Title I funds will be used for well-planned programs for the intended beneficiaries where the parents of the intended beneficiaries are authorized to perform oversight responsibilities with respect to the proper implementation of the program.

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[38] This legislative premise described in the text is expressly set forth in the legislative history--House Report No. 93-805, 3 U.S. Code Cong. and Adm. News 4109 (1974).

E. Funds Allocation Provisions

To ensure that Title I funds are used to "expand and improve" [39] the educational programs of educationally deprived children residing in low-income areas and to meet their "special" [40] as opposed to regular or ordinary needs, the Title I statute and regulations have historically (a) prohibited certain types of discrimination with respect to the distribution of state and local funds and (b) required the provision of a certain minimum level of state and local support. Specifically, the Title I statute and current regulations contain the following provisions:

State Aid: The state is prohibited from distributing state aid in any way which takes an LEA's Title I allocation into consideration and then penalizes the LEA in the distribution of state funds. [41]

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[39] Section 101 of Title I (20 U.S.C. 241a).

[40] Id.

[41] Section 143(c)(1) of Title I. (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44(1975); now at 45 C.F.R. §116.18(1976).

Maintenance of Effort: Local school districts are required to maintain their fiscal effort so that they do not shift to the federal government their ongoing financial responsibilities for their educational programs.[42]

Comparability: Services provided with state and local funds (measured in terms of pupil to teacher and expenditure per pupil for instructional salaries ratios) to project area schools, i.e., schools receiving assistance under Title I, are approximately equal to services provided to non-project area schools.[43]

Equitably Provided: Services must be equitably to educationally deprived children according to objective criteria.[44]

Supplement, Not Supplant: Title I funds must be used to supplement, not supplant the level of state and local funds which, in the absence of Title I funds, would have been provided to children participating in Title I programs.[45]

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[42] Section 143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); 45 C.F.R. §116.45(1975), now at 45 C.F.R. §116.19(1976).

[43] Section 141(a)(3)(C) (20 U.S.C. 241e(a)(3)(C)); 45 C.F.R. §116.26(1975), now at 45 C.F.R. §116a.26(1976).

[44] 45 C.F.R. §116.17(h)(3)(1975). Under the revised regulations, the "ordinarily provided" provision has been replaced by the "equitably provided" provision. 45 C.F.R. §116a.22(b)(10)(1976).

[45] Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B)); 45 C.F.R. §116.17(h)(1) and (2)(1975); now at 45 C.F.R. §116.40(1976).

Excess Costs: Title I funds will only pay for the excess costs of programs and projects. 46/

General Aid: Title I funds must be used to meet the needs of educationally deprived children and not for meeting the needs of the school or the school district, however pressing those needs may be. 47/

Each provision is included to guard against a *distinct* type of discrimination in the provision of state and local funds. The following examples illustrate the function which each requirement performs.

Assume that in State A the state school aid formula reduces an LEA's state education aid by the amount of Title I funds received, i.e., a school district receiving twenty million dollars in Title I funds will receive twenty million dollars less state aid than it would otherwise have received. In this situation the school district is penalized by receiving less state aid than it would have received but for the existence of Title I. Title I funds, in this example, simply replace

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46/ Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)); Program Guide No. 44, Section 4.1, now at 45 C.F.R. §116.40(a)(2)(iii)(1976).

47/ Section 101 of Title I (20 U.S.C. 241a); 45 C.F.R. §116.17 (g)(1975), now at 45 C.F.R. §116a.22(b)(4)(iii), (b)(6), (b)(7) and (b)(8)(1976).

state funds resulting in no net increase in funds available to meet the special educational needs of educationally deprived children. The Title I legal framework includes a provision designed to prohibit this type of penalization. [48]

Assume now that School District 1 reduces its local tax revenues by the amount of its Title I allocation, i.e., the LEA uses Title I funds to replace its local fiscal effort. The net effect is the same as in the example above, with Title I funds simply replacing local funds in Title I schools. The Title I maintenance of effort requirement is designed to ensure that federal assistance serves a supplemental rather than a basic education function, and that Title I grantees not shift to the federal government ongoing financial responsibility for basic education programs. [49]

Assume that School District 1, in response to pressure from parents residing in more affluent areas in the district (or because the district does not have an objective system for distributing state and local funds to schools within the district), provides a lower pupil to instructional staff ratio and greater expenditures per pupil for instructional salaries in schools not receiving assistance under Title I than in Title I schools. Assume, further, that the schools in the non-Title I areas provide kindergarten to the children of appropriate age paid for with state and local funds; whereas, the kindergarten age children in Title I areas receive the same instruction paid for with Title I funds.

The Title I comparability provisions are designed to ensure that Title I funds provide services in Title I areas that are over and above the level provided from local and

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[48] See *supra*, note 41.

[49] See supra, note 42.

and state funds in non-Title I areas. As Congressman Quie explained on the House floor (Volume 116, Part 8, 91st Congress, 2nd Session at P. 10013):

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children, this purpose is defeated.

Thus, the first type of discrimination described above is prohibited by the comparability provisions.[50] The LEA must provide in each Title I area services comparable to those in non-Title I areas. Comparability is determined by specific ratios (pupil to instructional staff ratio and expenditures per pupil for instructional salaries).

However, in the example above, the comparability regulations do not prohibit School District 1 from discriminating against Title I schools in the provision of kindergarten;[51]

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[50] See supra, note 43.

[51] Comparability is generally measured in terms of two ratios; (1) pupil to staff and (2) expenditures per pupil for instructional salaries. The existence of a kindergarten program which adds both pupils and teachers will not show up for purposes of computing comparability. For example, if school A has 8 instructional staff members and 200 children, without kindergarten, its pupil to staff ratio is 25 to 1. If 50 full-day kindergarten children and 2 kindergarten teachers are added to the school its pupil to staff ratio is still 25 to 1 (250 children ÷ 10 teachers).

However, this type of penalization was prohibited by the "ordinarily provided" provision and continues to be prohibited by the new "equitably provided" requirement. [52]

If, for example, there are ten (10) Title I schools and ten (10) non-Title I schools in the school district, each school has 50 children of kindergarten age and the LEA only has sufficient state and local funds to support a kindergarten program in ten of the twenty schools, the ordinarily provided provision is designed to ensure that the Title I eligible children will receive their fair share of state and local funds for kindergarten programs. In this district a proportional distribution of state and local funds would require that five (5) Title I schools receive state and local funds for kindergarten and five (5) non-Title I schools receive such support. [53] The LEA's Title I funds may then be used to provide kindergarten in the remaining five Title I schools. In this way Title I children, taken as a whole, receive supplementary kindergarten services.

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[52] See supra, note 44. The revised regulations which were published in the Federal Register on September 28, 1976 1976, replaced the "ordinarily provided" provision with a requirement for the "equitable provision" of state and locally funded services. (§116a.22(b)(10), 41 FR 42919). Even before the issuance of the revised regulations OE interpreted "ordinarily provided" consistently with the concept of the "equitably provided" requirement.

[53] If the schools had unequal enrollments, the proportional distribution would have to be determined by the number of kindergarten children in areas eligible and ineligible for Title I services.

Now assume that a Title I school decides to use Title I funds to provide children in the Title I program with their regular academic instruction for the entire school day. The Title I program is identical to the regular program. The class size for Title I children is identical to the class size for children not participating in the program. In sum, children in the Title I program receive no assistance from state and local sources for their education, in contrast to children not participating in the Title I program whose instruction is paid for from state and local funds, e.g., $1,000 per child.

The comparability and ordinarily provided requirements do not prohibit the type of penalization described above, i.e., discrimination which is occurring within the project area school; they only compare services in Title I areas with services in non-Title I areas. It is necessary to look to another requirement, that Title I funds supplement and not supplant state and local funds. The supplement, not supplant requirement,[54] which governs this situation, specifies that Title I funds must not replace the level of funds which would have been made available to children in Title I programs but for the existence of Title I, i.e., children in Title I programs must receive the level of state and local funds they would have received if Title I did not exist.

If Title I did not exist, the children in the Title I program would have received the same level of state and local funds as other children in the school. Thus, the use of Title I funds to provide the regular academic program described above is prohibited by the supplement, not supplant, provision.

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[54] See supra, note 45.

The excess costs provision added by Congress in 1974,[55] which provides that Title I funds may only be used to pay for the excess costs of programs, also governs the above situation. If the state and local expenditure in the district is $1,000.00 per pupil for the regular academic program, Title I may only pay for the costs of the program which are in excess of $1,000.00 per pupil.[56]

The supplement, not supplant and excess costs provisions are closely related. Supplement, not supplant prevents LEAs from discriminating against children in Title I programs in the apportionment of state and local funds, because of the existence of Title I. The excess cost provision reinforces the above standard by governing the level of state and local funds an LEA must commit to the education of children in a Title I program before Title I funds can be used to pay for supplementary components.

In sum, the provisions of Title I which (a) prohibit a state from penalizing an LEA because of the receipt of Title I funds;

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[55] P.L. 93-380. See supra, note 46.

[56] In other situations excess costs requirement is useful for determining the amounts which Title I can pay for particular services or other program components, i.e., the excess cost of a particular supplemental service.

(b) require LEAs to maintain prior fiscal effort; (c) require comparability among Title I and non-Title I schools; (d) require that an LEA equitably provide state and local services before using Title I to pay for additional amounts of that service; (e) require Title I funds to supplement and not supplant state and local funds; and (f) require Title I funds to pay for only the excess costs of programs and projects address distinct, but interrelated, forms of discrimination in the allocation of state and local funds to children in Title I programs and schools. Each provision is essential to prevent the form of discrimination it addresses, as described in the examples above. Each is designed to ensure that the "special educational needs of educationally deprived children" are served. If any of these provisions were deleted, Title I could be transformed into general school aid or property tax relief.

In addition to the anti-discrimination provisions described above, the Title I legal framework includes the general aid prohibition, a fundamental requirement designed to ensure the categorical nature of the Title I program. To delete the prohibition against using Title I funds for general aid purposes would have the effect of recasting Title I into a general school aid or property tax relief program and would, in all probability, reduce the total number of educationally deprived children receiving benefits under Title I.

F. Accountability Provisions

The final category of requirements, which include the reporting,[57] recordkeeping[58] and access to information[59] provisions, are designed to ensure fund and program accountability. These requirements provide a means for verifying compliance with other Title I legal requirements described above, including, for example, (1) the requirement that Title I funds only be used to meet the needs of educationally deprived children residing in low-income areas and not to meet the needs of children residing in eligible areas who are not educationally deprived or children who do not reside in low-income areas; and (2) the requirement that Title I funds be used to supplement, not supplant state and local funds.

These accountability provisions enable the LEA, SEA, parents and HEW to determine whether the substantive requirements of Title I have been satisfied. To delete these accountability provisions would (1) foreclose attempts to document compliance or lack thereof, and (2) limit research which seeks to determine the reasons for the success or failure of Title I programs. Researchers would not be able to determine whether a program failed because of poor design or because Title I funds intended for Title I programs were diverted to other purposes or used to replace state and local funds.

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[57] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975), now at 45 C.F.R. §116.46(1976).

[58] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975).

[59] Section 141(a)(7) and (a)(8) of Title I (20 U.S.C. 241e(a)(7) and (a)(8); 45 C.F.R. §116.17(n)(1975), now at 45 C.F.R. §116.45(1976).

Chapter 1

LEA ELIGIBILITY AND RESTRICTIONS CONCERNING DISTRIBUTION OF STATE AID

Chapter 1

LEA ELIGIBILITY AND RESTRICTIONS CONCERNING DISTRIBUTION OF STATE AID

I. Introduction

Under the terms of the Title I legal framework, a local educational agency (LEA) is eligible to apply for and receive a grant under Title I if the following three requirements are satisfied: (1) a specified minimum number of children from low-income families reside in the school district; (2) a minimum amount of Title I expenditures are planned for the program, and (3) the LEA has "maintained its fiscal effort." In addition, the Title I legal framework provides that the state may not penalize LEAs receiving Title I funds in the distribution of state aid. Set forth below is a brief description of each requirement.

II. Minimum Number of Children

First, to be eligible for assistance under Title I, there must be at least ten children between the ages of 5 and 17 from low-income families residing in the school district of the LEA.[60/] If such data is not available, the LEA is still eligible for a grant under Title I if the school district is

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[60/] Section 103(b)(1) of Title I (20 U.S.C. 241c(b)(1)); 45 C.F.R. §116a.3(a)(1976). See note 3 supra, for definition of the term "local educational agency."

located within a county which has ten or more children from low-income families.[61]

III. Minimum Amount of Title I Expenditures

The Title I statute requires that a Title I program or project be of "sufficient size, scope and quality to give reasonable promise of substantial progress" toward meeting the goals of Title I.[62] In addition, a Title I program must involve the expenditure of at least $2,500 unless the state educational agency (SEA)[63] authorizes a reduced amount after determining that

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[61] Section 103(b)(2) and (3) of Title I (20 U.S.C. 241c (b)(2) and (b)(3)); 45 C.F.R. §116a.3(b)(1976). The minimum number of children requirement does not apply to Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific. (45 C.F.R. §116a.4 (1976)).

[62] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B); 45 C.F.R. §116a.22(b)(1976).

[63] *See* note 10 *supra*, for definition of the term "state educational agency."

> it would be impossible, for reasons such as distance or difficulty of travel, for the applicant to join effectively with other (LEAs) for the purpose of meeting the requirement.[64]

IV. Maintenance of Effort

The maintenance of effort requirement is generally designed to ensure that Title I grantees do not shift to the federal government what Congress has considered to be their ongoing financial responsibility to their education program, and, further, to help ensure that federal assistance serve a supplemental rather than a basic education function.[65] In other words, the maintenance of effort provisions are designed to "prevent the erosion of state and local support which might otherwise occur with the availability of increased federal funds."[66]

Prior to describing the maintenance of effort provisions,[67] it should be noted that these provisions were amended by Congress in the Education Amendments of 1976.[68] The amendments were made after the U.S. Office of Education (OE) issued its final Title I regulations in the *Federal Register* on September 28, 1976; consequently, the amendments are *not* reflected in the current Title I regulations. The following description is largely based on the requirements set forth in the Title I statute as recently amended by the 1976 Education Amendments.

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[64] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)); 45 C.F.R. §116a.22(b)(4)(i)(1976). In meeting the minimum expenditure requirement, two or more LEAs may enter into agreements to carry out jointly operated Title I programs and projects. (§141(a)(1)(B) of Title I). The minimum expenditure requirement is one of the criteria which must be met before a SEA determines that proposed Title I program or project is of sufficient size, scope and quality (45 C.F.R. §116a.22(b)(4)(i)(1976).

[65] [ ] Cong. Rec. 7043 (daily ed. April 7, 1965).

[66] Letter from OE to a State Superintendent of Education dated October 3, 1969. Maintenance of effort provisions exist in many federal education laws.

[67] The maintenance of fiscal effort requirement is conceptually similar to the supplanting restrictions contained in Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B) which are discussed *infra*.

The Title I statute currently requires that the "'combined fiscal effort,' *as measured by either the amount per student or the aggregate expenditures*, of the LEA and the State for free public education for the *preceding year* must not be less than their combined fiscal effort for the second preceding year."[69] The statute provides that no payment may be made to an LEA unless the SEA "finds" that the maintenance of effort requirement has been met.[70]

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[68] *See* §323(a)(1) of the 1976 Education Amendments, amending §143(c)(2) of Title I (20 U.S.C. 241g(c)(2)) and §323(b) of the 1976 Education Amendments, adding a new §431A to GEPA (20 U.S.C. 1232).

[69] Section 143(c)(2) (20 U.S.C. 241g(c)as amended by §323 (a)(1) of the Education Amendments of 1976). Prior to the 1976 amendments, LEAs were required to measure "fiscal effort" only in terms of *expenditure per pupil*; the aggregate expenditure option was not available. 45 C.F.R. §116. 45(b)(1974). The current regulations provide that the combined fiscal effort for the preceding year must not be less than the combined fiscal effort for the second preceding fiscal year *by more than 5 percent*. (45 C.F.R. §116.19(b) (1976)). It appears that this 5 percent leeway in determining maintenance of effort could be retained in any amended regulations because of the statutory phrase "combined fiscal effort per student or the aggregate expenditures (as determined in accordance with regulations of the Commission)" (§143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); as amended by §323(a)(1) of the 1976 Education Amendments.

The current regulations also provide that an agency which receives at least 95 percent of its funds for education from federal sources is not required to satisfy the maintenance of effort requirement (45 C.F.R. §116.19(3)(1976)).

Section 431A(b)(2) of GEPA (20 U.S.C. 1232) authorizes the Commissioner to waive the maintenance of effort requirement in two situations.[71] First, in cases involving "exceptional circumstances," the Commissioner may waive the requirement for only one fiscal year if he

> determines such waiver to be
> equitable in order to reflect
> such circumstances, including those
> resulting from decreasing enrollments
> or fiscal resources of the relevant
> [LEA] or the State, or both.[72]

If the Commissioner grants such a waiver, he must reduce the amount of the federal payment for the current fiscal year in the exact proportion to which the combined fiscal effort was less than 100 percent for the second preceding fiscal year.[73]

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[70] Section 143(c)(2) of Title I (20 U.S.C. 241f(c)(2)).

[71] These statutory waiver provisions supersede the "unusual event" proviso in the current regulations (45 C.F.R. §116.19(b) (1976)).

[72] Section 431A(b)(2)(A) of GEPA (20 U.S.C. 1232(b)(2)(A) as amended by §323(b) of the 1976 Education Amendments.

[73] *Id.*

Second, in cases involving "very exceptional circumstances," the Commissioner may grant a similar waiver for only one fiscal year if he determines that the waiver is "equitable in order to reflect such circumstances, including those from decreasing enrollments or fiscal resources of such [LEA]."[74] The statutory provision governing "very exceptional circumstances", in contrast to the "exceptional circumstances" waiver provision, is silent about any reduction in Title I payments. However, the legislative history clearly explains that where the Commissioner finds the existence of "very exceptional circumstances", the full level of Title I payments would be maintained.[75]

The Commissioner is required to establish "objective criteria of general applicability" to carry out the waiver authority described above.[76]

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[74] Section 431A(b)(2)(B) of GEPA (20 U.S.C. 1232(b)(2)(B)), as amended by §323(b) of the 1976 Education Amendments. The Conference Committee Report accompanying the Education Amendments of 1976 indicates the following types of "very exceptional circumstances" to which coverage extends: (a) the tax base of a local educational agency has decreased very significantly, e.g., removal of property from the tax roll because of urban renewal, government acquisitions of previously taxed property in substantial amount, or natural disaster of taxable property; (b) the capacity to raise funds is out of the control of a local education agency because of a very substantial need to reduce fiscal resources, or fiscal resources have been diverted very significantly to other functions which are not within the control of the board; (c) situations that occur in States where State law requires that each school district must go to the voters for special levies to meet operating expenses over and above those guaranteed by the State; and further, State law prohibits a school district from trying more than twice in any one year to obtain voter approval of a school maintenance and operation levy. The managers would expect the Commissioner to assure that the school district had made every possible effort to comply before granting a waiver. (H.R. Rep. No. 94-1701 94th Cong., 2d. Sess., 233, (1976)).

[75] Id.

[76] Section 431A(b)(3) of GEPA (20 U.S.C. 1232(b)(3)), as amended by §323(b) of the 1976 Education Amendments.

V. Restrictions Concerning State Aid

The Title I provision prohibiting states from discriminating against school districts receiving large sums of Title I funds in the provision of state aid, like the maintenance of effort provisions and several other provisions described _infra_, is intended to ensure that the Title I funds secured are used to pay for _supplementary_ services designed to meet the special educational needs of educationally deprived children residing in low-income areas.[77] If states were permitted to reduce the level of state aid by the amount of Type I funds received there would be _no_ net increase in the amount of funds available to the local school district to meet the _special_ needs of the educationally deprived children; Title I funds simply would be used to replace the state funds that would have been made available but for the existence of Title I.

Specifically, the Title I legal framework provides that the State in which the LEA is located must _not_ take into consideration payments under Title I in determining (a) the eligibility of the LEA for State aid, or (b) the amount of State aid for the present year or for the preceding fiscal year,[78] for example, by reducing State education aid by the amount of Title I funds received by its LEAs. The regulations clarify this statutory requirement by explaining that the SEA is only prohibited from taking into consideration the amount of State aid "in such a way as to penalize the applicant agency with respect to the availability of State funds."[79] The State may provide additional State aid to school districts receiving large amounts of Title I funds without contravening any Title I provision.

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[77] The restriction concerning state aid is conceptually similar to the supplanting restrictions contained in Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B) which are discussed _infra_.

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[78] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)).

[79] 45 C.F.R. §116.18(1976). The comments preceding the current regulations indicate that §116.18 was "reworded to clarify that Title I funds cannot be considered in such a way as to penalize an applicant agency in the amount of state aid it receives. This change would permit applicant agencies to be eligible for and receive additional State funds on the basis of their Title I eligibility" Comment 10 to "Other Changes in Part 116",41 FR 42897 (September 28, 1976).

Chapter 2

SCHOOL ATTENDANCE AREA ELIGIBILITY AND TARGETING REQUIREMENTS

Chapter 2

School Attendance Area Eligibility and Targeting Requirements

I. Introduction

Once it has been determined that a school district is eligible to apply for and receive a grant under Title I, the school district must demonstrate in its application to the SEA which school attendance areas [80] within the district are eligible for Title I funds. According to the Title I legislation, a particular school attendance area will be eligible for a grant under Title I if a high concentration of children from low-income families reside in that area.

Once the LEA determines which areas are eligible for assistance, it must "target," from among the eligibles, those areas which will actually receive assistance under Title I. Such areas actually targeted are commonly referred to as project areas. [81]

This chapter will explain (1) the general rules set forth in the regulations prescribing "how to" determine which school attendance areas are eligible for assistance, (2) the exceptions to these general rules, (3) the general rules for targeting areas, (4) the exceptions to these general rules, (5) a new provision allowing separate determinations pertaining to eligibility and targeting for grade spans, and (6) the applicability of these rules to school districts undergoing desegregation.

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[80] The term "school attendance area" means "in relation to a particular public school, the geographical area in which the children who are normally served by that school reside." 45 C.F.R. §116a.2(1976).

[81] Specifically, the term "project area" means "an attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the locality of the project itself, is designated as an area from which children are to be selected to participate in a project." 45 C.F.R. §116a.2(1976).

II. General Rules Concerning School Attendance Area Eligibility

According to the Title I legislation not all areas within a school district are eligible to receive assistance under Title I. The legislation[82] provides that Title I funds may be used by LEAs for programs and projects "which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families."

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[82] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)). The regulations do not define a particular income level which must be considered "low-income." An old OE program guide issued in 1968 and recently superseded (Program Guide No. 44, Section 1.1) stated that in determining eligibility "...it is not necessary for the LEA to use a particular income level, although a level of $2,000 or $3,000 would be appropriate." It would appear that the level proposed in Program Guide No. 44 is far too low under today's standards. Although the regulations do not specify the specific level of income considered "low-income", they do include certain prescriptions. First, the regulations specify that available data should be used to make "an accurate determination of the number of children from low-income families." 45 C.F.R. §116a.20(f)(1976). Second, where data are not available to make an accurate determination of the number of children, "the number may be estimated on the basis of the number of children in families receiving (AFDC), the number of children eligible to receive benefits under the National School Lunch Act, or any other reliable and uniform indicator of poverty, or a combination of such factors." Id. Finally, the regulations provide that "whatever data are used must be applied uniformly throughout the applicant's school district." Id.

According to the regulations issued by OE, the LEA may use either of two basic methods for determining which school attendance areas within a district are considered as "having high concentrations of children from low-income families." Under the first method, only those school attendance areas with a percentage of children from low-income families as high as the district-wide average are eligible to participate in Title I programs ("percentage method"). Under the second method, only those school attendance areas in which the number of such children is as large as the average number of such children per attendance area in the district are eligible ("numerical method").

Specifically, the regulations provide that a school attendance area is eligible to participate in a Title I program if:

(1) the percentage of children from low-income families in that attendance area is at least as high as the percentage of such children residing in the whole of the school district [83]

(2) the estimated number of children from low-income families residing in that attendance area is at least as large as the average number of such children residing in each of the several school attendance areas in the school district. [84]

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[83] 45 C.F.R. §116a.20(b)(2))1976).

[84] 45 C.F.R. §116a.20(b)(3)(1976). OE was recently asked to explain its policy concerning the question whether an LEA which has carryover funds must use these funds as part of a new school year's program thereby requiring, among other things, the recomputation of school attendance areas. OE response (1976) explained that "...I must point out that project activities funded with carryover funds should be part of the program for the new school year which means that new determinations of eligible and participating school attendance areas... have been made and approved by our your agency."

In addition, the regulations permit an LEA to have some areas ranked on one basis and some on the other. However, if a combination of the methods is used, "the number of attendance areas actually designated under [45 C.F.R. §116a.20(b)(1)] may not exceed the number of such areas that could be so designated if only one such method had been used."[85]

III. Exceptions to the General Rules for Determining School Attendance Area Eligibility

A. Introduction

LEAs can determine school attendance area eligibility by using the above methods. However, there are additional ways in which areas can qualify for Title I. These exceptions in the law and regulations include (1) the no-wide variances option; (2) the formerly eligible exception; (3) the enrollment option and (4) the 30% option.

B. No-Wide Variances Exception to General School Attendance Area Eligibility Requirements

The first exception is commonly referred to as the "no-wide variance" provision. The no-wide variances exception reflects the fact that if all school attendance areas have approximately the same incidence of poverty, the poverty criterion will be of little value in determining which areas have the highest incidence of educational deprivation. The regulations[86] provide that "if there is no wide variance in the concentrations of children from low-income families among the several school attendance areas in a school district, the whole of that school district may at the option of the [LEA] be regarded as a project area."[87] The regulations contain an objective standard for determining when a "no-wide variance" situation exists. The LEA may make such a determination "only if the variation between the areas with the highest and the lowest percentage of such children is not more than one-third of the average percentage of children from low-income families in the district as a whole." This exemption is explained graphically on the next page.

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[85] 45 C.F.R. §116a.20(b)(4)(1976). (Emphasis added.)

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[86] 45 C.F.R. §116a.20(d)(1976).

[87] Id. However, since the concentration requirement (45 C.F.R. §116a.22(b)(5)(1976)) must still be met, this does not necessarily mean that all the schools within a district may be "targeted" as project areas. See *infra*, pp. 56 - 59 for a description of the targeting requirements.

In responding to various comments about the one-third standard, OE stated, in the comments preceding the regulations, that "the legislative history of Pub. L. 89-10, the Elementary and Secondary Education Act of 1965, which established Title I, indicated that *only in limited circumstances may a whole school district be considered eligible as a 'low-income area.'* (See Sen. Rept. No. 146, p. 9 (1965). A further broadening of the 'no-wide variance' standard would be inconsistent with this history, and with the requirement in Section 141(a)(1) that the areas selected have 'high concentrations of children from low-income families.'" Comment 7 to §116a.20, 41 FR 42893 (September 28, 1976). (Emphasis added)

NO WIDE VARIANCE (EXAMPLE)

ATTENDANCE AREA		PERCENT	ACTUAL VARIANCE	DISTRICTWIDE PERCENT		ALLOWABLE FACTOR		ALLOWABLE VARIANCE
A		30						
B		28						
C		27						
	AVE. %		7%	26	X	1/3	=	8.67%
D		25						
E		24						
F		23						

ALL ATTENDANCE AREAS COULD BE DECLARED ELIGIBLE -- SUBJECT TO SEA APPROVAL

C. The Formerly Eligible Exception

In order to provide a degree of continuity, a second provision prevents a formerly eligible school from losing its eligibility because of a change in its ranking. Prior to 1974, a school attendance area which was designated as a project area for a particular year could not continue to be designated as a project area during the next year if it failed to meet the general school attendance area eligibility requirements described supra. The Education Amendments of 1974 provide that an eligible attendance area which has been selected as a project area may continue to be eligible to be designated as a project area for at least two additional years.

In this regard, Section 141(a)(13) of Title I (20 U.S.C. 241e(a)(13)) specifies that where a school attendance area

> does not meet the requirements of [Section 141(a)(1)]...but did meet the appropriate requirement in either of the two preceding fiscal years, that school attendance area shall be considered to meet the applicable criterion for that fiscal year. [88]

The formerly eligible provision is described graphically on the next page.

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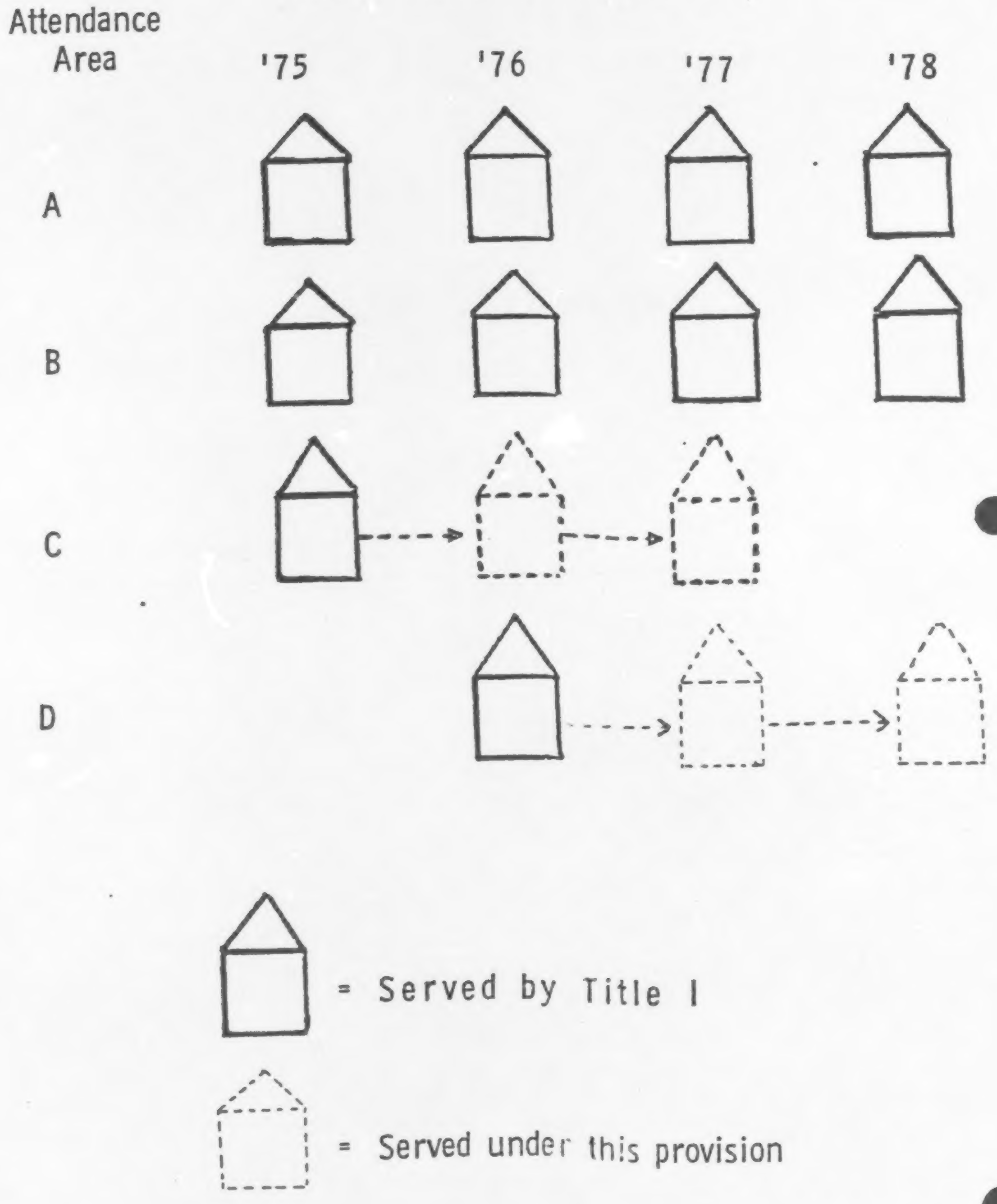
[88] The legislative history of the Education Amendments of 1974 explains the basis for this addition: "The Committee has adopted this amendment in response to pleas from educators during our hearings that the present laws and regulations frequently result in new listings of participant schools every year. This type of constant shifting among schools is bound to be disruptive of any sound educational program." H.R. Rep. No. 93-805, 93d Cong., 2d Sess. (1974) U.S. Code Cong. and Adm. News 4107-8. See 45 C.F.R. §116a. 20(g)(1976) which provides that "neither of such two preceding fiscal years shall be earlier than fiscal year 1975."

THREE YEAR OPTION


Attendance Area
'75
'76
'77
'78
A
B
C
D
= Served by Title I
= Served under this provision

D. The Enrollment Option

Under certain conditions, a LEA may provide Title I services to certain public schools in ineligible school attendance areas.[89] Under the Education Amendments of 1974 a LEA may, "at its discretion", use Title I funds for educationally deprived children attending a school not located in an eligible school attendance area if "the proportion of children in actual average daily attendance from low-income families is substantially the same as the proportion of such children" in an eligible attendance area.

The regulations[90] implement this statutory provision by providing a standard to determine when this "enrollment option" may be used by a LEA. Title I services may be provided to public schools in non-qualifying school attendance areas "if the percentage or number of children from low-income families in average daily attendance at that school is at least as high as the districtwide average percentage or number required" for eligibility on an attendance area basis in accordance with the general school attendance area rules described supra.

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[89] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)). The legislative history accompanying the 1974 Education Amendments explains the purpose of this addition. "Existing law links eligibility as a Title I school with the location of the school in an attendance area with a high concentration of children from low-income families. However, in some school districts, because of the attendance of children in nonpublic schools, the economic composition of the attendance area served by a public school is not reflective of the economic level of the children actually enrolled. Existing law would bar the designation of such a school, even though its actual enrollment would qualify it to be a Title I target school under the poverty criteria utilized by the school district." S. Rept. No. 93-763, 93d Cong., 2d Sess. 30 (1974).

[90] 45 C.F.R. §116a.20(h)(1976). The enrollment option presumes that the LEA has completed the ranking of attendance areas based on either the percentage or number of low-income children residing in the attendance area.

E. The 30-Percent Option

As explained supra, a school attendance area will be eligible for participation in a Title I program if the percentage of children from low-income families in that attendance area is at least as high as the percentage of such children districtwide ("percentage method"). In addition, a LEA may specifically request that attendance areas in which at least thirty percent of the children are from low-income families be approved for participation in Title I, [91] even where the district-wide average is substantially higher. The 30-percent rule is described graphically on the next page.

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[91] 45 C.F.R. §116a.20(b)(2)(1976). For purposes of the 30 percent option, only children who are determined to be eligible for free lunches pursuant to criteria established by the SEA in accordance with the National School Lunch Act (42 U.S.C. 1758b) and regulations (7 C.F.R. 245) may be counted. Id. There is no statutory basis for the 30 percent option. The Comments preceding the text of Title I regulations stated that "this provision is consistent with the legislative history expressed in the House Report for the Education Amendments of 1974(Pub.L. 93-380) (see House Rept. No. 93-805, pp. 16-17 (1974)) in the legislative history to the Elementary and Secondary Education Amendments of 1966. (Pub. L. 89-750) (see House Rept. No. 1814, p. 3 (1966))." Comment 2 to §116a.20, 41 FR 42898 (September 28, 1976).

ATTENDANCE AREAS WITH 30% OR MORE LOW-INCOME CHILDREN (EXAMPLE)

	ATTENDANCE AREA	TOTAL RESIDENT CHILDREN	LOW-INCOME RESIDENT CHILDREN	PERCENT LOW-INCOME CHILDREN	
	A	1000	800	80%	
	B	1000	750	75%	
AVERAGE	C	800	600	75%	DIST. % 54.4
NUMBER 444	D	600	240	40%	
30%	E	500	175	35%	
	F	1000	100	10%	
	TOTAL	4900	2665		

Average Number 2665 ÷ 6 = 444

District Percent 2665 ÷ 4900 = 54.4%

SCHOOLS D AND E COULD BE DECLARED ELIGIBLE UPON SPECIAL REQUEST AND APPROPRIATE DATA SUBMITTED BY LEA AND APPROVED BY SEA

IV. General Rules for Targeting School Attendance Areas

The Title I legislation[92] provides that payments under Title I must be used for programs and projects "which are of sufficient size, scope, and quality to give reasonable promise of substantial progress" toward meeting the needs of educationally deprived children in low-income areas.

In school districts in which it is not possible to comply with the above statutory requirement and at the same time serve all educationally deprived children in all eligible attendance areas, the regulations include specific rules for selecting the children and the areas which are to receive special assistance under Title I. The regulations explain that the above statutory provision may be satisfied either by limiting the number of children or areas. This chapter explains the rules pertaining to targeting school attendance areas. Chapter 4 explains the rules pertaining to targeting children.

The general rule concerning the designation of project areas from among eligible areas is commonly referred to as the "no-skip" provision. This provision[93] generally states that an LEA may not designate a school attendance area as a project area "unless all attendance areas with a higher percentage or number of children of low-income families...have been so designated."

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[92] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)).

[93] 45 C.F.R. §116a.20(c)(1)(1976).

There are three exceptions to this general principle. These exceptions are described below.

V. Exceptions to the General Rules Concerning the Targeting of School Attendance Areas

A. Substantially Higher Incidence of Educational Deprivation In Lower Ranked Schools

First, an LEA may skip a higher ranked school if a lower ranked school has a "substantially" higher incidence of educational deprivation. Specifically, the regulations[94] provide that a higher ranked school may be skipped

> if such agency can demonstrate, to the satisfaction of the State educational agency, that the incidence and severity of educational deprivation in [the area having a higher incidence of low-income families] is substantially less than in other attendance areas proposed to be designated.

Under the circumstances described above, the regulations provide that a "skipped school" may not be included in the non-project area average for purposes of computing comparability and the LEA must in fact demonstrate that the skipped school is comparable to the non-project area school average. Specifically, the regulations[95] provide that the SEA, before it allows an LEA to take advantage of this exception, must first determine that

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[94] 45 C.F.R. §116a.20(c)(2)(1976).

[95] *Id.*

> the services provided with State and local funds in any area which has a higher percentage or number of children of low-income families but which is not designated for a project area are comparable to the services provided in other areas not designated.

If a SEA does not first make this required determination, then it cannot approve such a LEA request for an exception.

B. Schools Deemed Eligible In Accordance With The Formerly Eligible Rule

Earlier in this chapter, the "formerly eligible" exception to the general eligibility rules was described. [96] This exception also serves as an exception to the targeting requirements. Thus, a school previously designated as a project area school may continue to be so designated for an additional two years even if it is no longer one of the highest ranked schools.

C. Schools Receiving the Same Nature and Scope of Services From State Sources as Would Otherwise Be Provided Under Title I

Finally, a LEA may designate a school attendance area as a project area or for inclusion in a project area if it has been designated "to receive (through the use of funds from other sources) services of the same nature and scope as those that would otherwise be provided under Title I," e.g., state compensatory education funds. 97/

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[96] See page 51.

VI. Separate Rankings For Grade Spans

The revised regulations 98/ include a new provision which expressly authorizes the use of separate averages and separate rankings by grade span with respect to the application of the general school attendance area eligibility rules and the relevant exceptions, i.e., the no-wide variance rules, the 30 percent rule, the formerly eligible provision, the enrollment option, and the general targeting rules and the relevant exceptions, i.e., serving schools with a lower incidence of poverty but a substantially higher incidence of educational deprivation, schools qualifying under the formerly eligible rule, and schools receiving the same nature and scope of services from state or local programs.

The regulations 99/ also specify that the grade span groupings used for purposes of making school attendance area eligibility and targeting decisions must be the same groups used by the LEA for purposes of reporting comparability. The rules for determining grade span groupings for demonstrating comparability are described infra, at page 204 .

97/ 45 C.F.R. §116a.20(c)(1)(1976).

98/ 45 C.F.R. §116a.20(b)(5)(1976). A similar provision formerly appeared in paragraph 5 of Section 1.1 of Program Guide No. 44.

99/ Id.

VII. The Operation of School Attendance Area Eligibility, Targeting and Other Requirements In Desegregated School Districts

The Title I statute and the federal regulations make no specific reference to the operation of Title I programs and projects in schools which have or are undergoing desegregation. Therefore, it is assumed that all requirements set forth in the statute and regulations apply equally to all school districts, regardless of their status respecting desegregation. OE's official policy statements were set forth in Program Guide No. 44 and Program Guide No. 64. These policies were further explained in an OE handbook entitled, Title I: How It Works and a program support package entitled Title I and Desegregation.

Before we describe the existing federal legal framework with respect to school districts undergoing desegregation, it is important to consider the history of these relevant program guides and handbooks, although these guidelines have been superseded.[100/]

From about 1965-1969, most school systems in the South desegregated by "freedom of choice" methods. Overlapping attendance areas based on race were maintained but individual school children could elect to attend schools outside their zones. Since there were no fixed attendance areas, minority

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[100/] See *supra*, p. 13.

children who had received Title I services in all-minority schools were penalized if they chose to attend white schools which did not have Title I programs. During this period of time, a USOE ruling in Program Guide No. 28 permitted Title I programs to "follow the child" in freedom-of-choice desegregation plans. Guide No. 28 was cancelled in 1971 by Guide No. 64, which specifically disapproved the practice for the future:

> Unfortunately, in some instances children who have participated in Title I programs under previous determinations of eligibility, including children who have been served on the basis that Title I services "follow the child," will now be residing in ineligible attendance areas and, therefore, will be ineligible for Title I services.

The basic premise of Program Guide No. 64, consistent with the statute and regulations, was that a child's eligibility to receive services is based on his/her residence in an eligible attendance area which has been designated a project area. Thus, if a child resides in an ineligible or non-project area, he/she is ineligible to receive Title I services regardless of whether he/she had received them before under any previous determination of eligibility.

According to Program Guide No. 64, the only time when Title I programs may "follow the child" was when children "who reside in eligible attendance areas but by specific arrangements attend schools serving ineligible areas may be considered for participation in the Title I program." The USOE Program Support Package explained that this part of Guide No. 64 was intended to make "provision for majority-to-minority transfer," which is often an added option for some students under desegregation plans.[101] The determination of which students can qualify for this extention of Title I services still must start with ranking the new attendance areas created by the desegregation plan.

Based on an analysis of the existing Title I statute and regulations, the following general federal rules apply regarding the selection of school attendance areas in school districts undergoing desegregation.

First, where area boundaries determine the school a child will attend and the school district has established new and well-defined school attendance areas or zones, the general eligibility rules described *supra* apply. Under these circumstances, Title I services may be provided to those children who either (1) reside in a school attendance area or zone with a percentage or number of children from low-income families as high as the district-wide average or (2) attend a school in an eligible area in which the enrollment of children from low-income families is substantially the same as or greater than the proportion of children from low-income families in eligible areas.[102]

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[101] Majority-to-minority transfer is defined as "the process by which students who are enrolled in schools in which their race is in the majority may transfer to any school (in the same district) where their race is in the minority." National School Public Relations Association, Desegregation How Schools are Meeting Historic Challenge (1973).

[102] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

Second, the no-well-defined-attendance-areas situation is not expressly addressed in the regulations. However, in Program Guide No. 44, OE explained that where there are no well-defined attendance areas, the LEA must determine which of its schools are eligible for Title I projects on the basis of the "percentage or number of children from low-income families actually enrolled in those schools" [103] operated by the LEA. This is consistent with the policy set forth in Section 141(a)(1)(A) which allows SEAs to use enrollment data under specified circumstances. In a recent letter (1976) OE explained, "probably the most feasible way of selecting the school attendance areas...is by the use of enrollment data. This would mean that the total number of children and the number of children from low-income families considered to be residing in the area served by a

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(footnote continued from previous page)

45 C.F.R. §116a.20(h)(1976). Recently OE was asked to explain how the school attendance area eligibility requirements should be applied under a desegregation plan which provides for the establishment of clearly identifiable attendance areas but wherein there are two separate attendance areas but different grade groupings. The OE response (1976) stated: "the first option is to consider each school as having a single attendance area. In those cases where a school serves one geographical area for one grade grouping and another geographical area for another grade grouping, the school attendance area would be considered the total area served by all of the grades in the school. A second possible option is to treat each attendance area serving a grade span grouping as an individual attendance area; several different areas being served by a single school. Nothing in the statute or regulations precludes treating separately several attendance areas within a single school where grade patterns are irregular or where the geographical areas served vary by grade level." This letter also points out the applicability of the Emergency School Aid Act to LEAs undergoing desegregation.

[103] Program Guide No. 44, Section 1.1.

particular school would be the number of such children enrolled in that school, plus the number of such children who would be enrolled in that school if they attended school or were not enrolled in a private school." A recent internal memorandum from the Commissioner (1976) explained that "if discrete geographical attendance areas no longer exist, the LEA is advised to identify eligible groups of children on the basis of their enrollment in schools serving high concentrations of children from low-income families."

Third, where a child resides in an eligible attendance area but, by "specific arrangements" attends a school serving an ineligible area (e.g., majority-to-minority transfer) that child may be considered for participation in a Title I program.[104] No child who lives in a project area and who would otherwise receive Title I services is to be denied such services as a result of exercising his/her right to enroll in another school.[105]

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[104] This policy was expressly set forth in Program Guide No. 64 and is consistent with the existing policy set forth in 45 C.F.R. §116a.19(c) of the revised regulations which provides that Title I projects must be "carried out at locations where the needs of the children can best be served."

[105] This policy was expressly set forth in Program Guide No. 44, Section 5.5, and is also consistent with 45 C.F.R. §116a.19(c) of the revised regulations (see the previous footnote). This policy was repeated in a 1976 letter from OE to an SEA. "A child is considered to be residing in the area served by the school he attends unless he is attending that school as a result of his own choice. In that event he may be considered as residing in the area served by the school he would have attended if he had not made that choice."

Finally, recall that *a school serving an attendance area which has been designated as a project, but which no longer satisfies the general eligibility requirements* may, at the discretion of the LEA, nonetheless remain eligible for at least two additional years.[106] However, a *newly* established school attendance area cannot utilize the "formerly eligible" provision because by definition it is a *new* attendance area which formerly did not exist. That provision applies only to formerly eligible school attendance areas.

In addition to OE policies expressly concerned with desegregation and the operation of the eligibility and targeting provisions, OE has issued policies concerning segregation. Under the OE regulations[107] "the [SEA] shall not approve a project involving construction of school facilities if it finds that such construction would tend to maintain the racial, cultural, or linguistic isolation of children." This provision is operative regardless of how school attendance area eligibility is determined in school districts which have undergone desegregation.

In addition, it has been explained in OE guidelines[108] that Title I funds may not be used to meet the specific requirements of a desegregation plan. "Nevertheless, the Title I program should have a positive effect on the applicant's desegregation program and should not in any event contribute to the maintenance or renewal of segregation."

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[106] See Section 141(a)(13) of Title I (20 U.S.C. 241e(a)(13))

[107] 45 C.F.R. §116.32(b)(1976).

[108] This policy was set forth in Program Guide No. 64 and is consistent with 45 C.F.R. §116a.21 concerning needs assessment and 45 C.F.R. §116a.22 concerning project description, size, scope, and quality.

Chapter 3

PROGRAM DEVELOPMENT: FUNDAMENTAL BASES OF, AND RELATIONSHIPS AMONG, TARGETING OF CHILDREN, NEEDS ASSESSMENT, AND PROGRAM DESIGN

Chapter 3

Program Development: Fundamental Bases Of, And Relationships Among, Targeting Of Children, Needs Assessment, And Program Design

I. Introduction

Targeting of children, program design, and needs assessment are interrelated Title I requirements. This interrelationship is implicit in one of the basic statutory provisions of Title I, §141(a)(1)(A), which states that Title I funds must be used for "programs and projects . . . which are designed to meet the special educational needs of educationally deprived children." (Emphasis added.)

Because they are interrelated, it is difficult to analyze any one of these requirements without discussing the others. When viewed as a whole, these requirements establish a process; for purposes of this paper we call this process program development. This chapter offers an overview of this process, without discussing any one of the requirements in detail. Detailed discussion of these requirements is left to later chapters in this manual.

This chapter describes the three aspects of program development. First, this chapter identifies the basic program development steps which stem from each of the three constituent requirements--targetings of children, needs assessment, and program design. Second, the relationship between these steps--their sequential order and the extent to which prior steps influence subsequent steps.

Third, the basic kinds of information on which each of the program development steps must be based.

The discussion of each of these aspects of program development is general. Detailed examination of program development methodology is omitted. The purpose of this chapter is to establish a background context for the chapters that immediately follow.

II. Definition of Terms

As used in this chapter "program development" refers to the three requirements--targeting of children, program design, and needs assessment--taken as a whole. Program development is a process consisting of several steps, each of which stems from one of the these constituent requirements.

"Targeting of children," as we use the phrase, is a two-part decision which determines the children who will participate in a Title I program. The first part is deciding which general groups of educationally deprived children will be considered for participation in the program. General groups means grade spans (e.g., grades K-6), and such groups as handicapped children, dropouts, neglected and delinquent children, educable mentally retarded children, trainable mentally retarded children, bilingual children, etc.

The second part is deciding which of the children falling withing a targeted general group will be the actual program participants.

"Program design" refers to the decisions which establish the objectives and sub-objectives of a Title I program and determine the program activities and services intended to meet those ends. These decisions include the initial selection of general instructional areas on which the program will focus.

"Needs assessment" refers to the process of empirical discovery and analysis which forms the basis of most (but not all) of the targeting and program design decisions. The needs assessment discovers the children who are educationally deprived and who have the greatest need. It determines the incidence, severity, contributing factors, and relative priority of those children's special educational needs.

In discussing the informational bases on which program development decisions should be made and the manner in which targeting, needs assessment, and program design steps should be performed, this chapter employs the terms "empirical evidence," "value perferences," and "educational theory."[109/] The Title I standards concerning the types of information that must be used in performing program development steps are phrased in general terms and are not restrictive as to methodological details. Consonant with the generality of the legal framework, the terms, "empirical evidence," "value preferences," and "educational theory," are used in this chapter only in a general sense, with common, everyday meanings implied.

109/ Although, these precise phrases are not contained in the regulations, the underlying concepts are imbedded in the regulations.

For our purposes "empirical evidence" refers to such information as: (a) the results of attempts to measure educational need or student achievement, (b) the results of direct observations by teachers of the academic performances or needs of students, and (c) the results of parental observations and experience concerning the needs of their children.

An example of a statement reflecting a value preference might be "It is more desirable to focus the Title I program on reading and mathematics rather than social studies and biology." An example of a statement reflecting an educational theory might be "Food services should be provided; many children are improperly nourished with consequent effects on their ability to concentrate on academic pursuits." [110]

III. The Steps of the Program Development Process

Analysis of the current Title I legal framework identifies each of the steps of the program development process. Section 141(a)(1) of the statute generally identifies the three requirements, targeting of children, needs assessment, and program design when it requires that Title I funds be used for "programs and projects . . . which are designed to meet the special educational needs of educationally deprived children." This basic provision and other statutory and regulatory standards prescribe, though at times only implicitly, each program development step.

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[110] The conclusion that "food services should be provided" is actually reached by the combination of empirical findings (some children are, in fact, improperly nourished, or there is substantial indication that they might be) and educational theory (there is a link between improper nourishment and ability to concentrate on academic work). See the discussion of Step 7, *infra*.

§141(a)(1) also indicates generally that targeting, needs assessment, and program design are interrelated Title I requirements. The requirements are met in sequential steps and the results of earlier steps affect later ones. As §116a.21(f) of the regulations indicates, targeting is related to needs assessment because it is the needs of the targeted children that must be assessed. Needs assessment, in turn, is a basic premise of program design; §116a.22(a)(1) states that project objectives must be formulated in relation to the needs identified in the needs assessment. The interrelationship of these three Title I requirements is more complex, however, since none of the steps originating in one requirement either precede or follow, as a group, those of either of the other two requirements. Steps of each are interspersed throughout the sequential ordering.

The paragraphs which follow identify each of the steps of the program development process, their origins in the Title I legal framework, their interrelationship, and the basic kinds of information on which they must be based.

1. Step 1 -- Review existing data to determine the general incidence and severity of educational deprivation in all eligible attendance areas.

The program development process begins with a needs assessment step, a review of existing data. §116a.21(a) of the regulations requires an LEA to demonstrate in its application that it

> has reviewed appropriate existing data, including past evaluations of Title I projects in that local educational agency, and data on the performance in the agency's basic programs of instruction of children residing in all eligible attendance areas. This must be done to determine the incidence and severity of educational deprivation among all children residing in an eligible attendance area. Such children shall include children enrolled in private schools, preschool children, children of school age not enrolled in a school, children in local institutions for neglected or delinquent children, as well as children enrolled in a public school.

2. Step 2 -- Decide the general instructional areas--and Step 3--Decide the general target groups.

After they review existing data LEAs must make two policy decisions. Either decision may be made first; they may also be made concurrently. The first decision is the program design step which determines the general instructional areas--reading, language arts, mathematics, etc.--on which an LEA will focus its program. The second decision is the targeting step which identifies the general groups of children--grade spans, and such groups as handicapped children, dropouts, bilingual children, etc.--that will be considered for participation in the program.

Identifying these two steps, §116a.21(b) of the regulations states that an LEA, after it selects the project area, must determine "the age or grade levels at which it will operate the Title I project (or projects)" and "the types of educational needs to be addressed by these projects."

These two steps are premises for the needs assessment. Children not in the targeted general groups need not be included in the more detailed needs assessment steps described below. Similarly, the assessment of instructional needs may be limited to the selected general areas. If an LEA decides to provide instructional services only in reading and language arts, no assessment of mathematics needs is necessary. (As implied above, the targeting of attendance areas is also a premise for the needs assessment.)

The selection of general target groups may be based on the value preferences of the program planners. If they wish, the planners may base their decision on educational theory as to the effectiveness of working with particular groups or grade levels. Or, they may gather empirical evidence and formulate some means of assessing which groups need help most. The legal framework is not restrictive in this regard; it merely states that the selection of target groups must follow, and not precede the review of existing data (Step 1).

The selection of general instructional areas must reflect emphasis on basic instructional needs, but the selection of particular general instructional areas may also be based on value preferences.

Title I legislative history establishes this point, and a second related point that since the focus of Title I projects must be on instructional needs, non-instructional services provided with Title I funds must be related to, and supportive of, educational objectives. The House Committee report [111] accompanying the 1974 Education Amendments states:

> The Committee believes that local educational agencies *should give priority attention in operating Title I programs to the basic cognitive skills* in reading and mathematics and to *related* support activities to eliminate physical, emotional, or social problems *that impede the ability to acquire such skills*. [Emphasis added.]

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[111] H.R. Rep. No. 93-805, 93d Cong., 2d Sess 3, reprinted in [1974] *U.S. Code Cong. and Adm. News* 4111-4112. This portion of the report was also quoted by a September 11, 1975, OE letter to a state included in our survey. The letter identified the passage as manifesting the "expressed intent of Congress."

Similarly, the 1974 Senate report[112/] stated

> The Committee recognizes that basic skills are undoubtedly important, and was pleased to note that the bulk of existing title I programs focus on such skills...
>
> [L]ocal officials are charged with developing local solutions to meet their specific needs. Often the solutions involve remedial education programs in basic skill areas. But many local officials have found that their children's educational progress also *depends on* provision of auxiliary services such as guidance and counseling programs or cultural enrichment. Title I is not basically a social services program; occasionally, however, such social services are necessary if *education is to take place*. [Emphasis added.]

Thus, the target of noninstructional services must be "problems that impede the ability" of students to "make educational progress," and such services may be provided to the extent that educational progress "depends on" them or they are "necessary if education is to take place" at all.

[112/] S. Rep. No. 93-763, 93d *Cong.*, 2d Sess. at 30-31. The Senate report offered these comments in the context of specifically rejecting a proposal that the Title I emphasis on "basic skills" be accomplished by a standard requiring a minimum *amount* of expenditure on such skills (75% of all funds). Noting that such a standard would pre-empt the findings of local needs assessments and thus sometimes prevent the provision of services that are in fact necessary, the Senate committee indicated that the underlying purpose of such an "amount" standard (i.e., ensuring primary emphasis on "basic skills") would be better accomplished by ensuring that noninstructional services are offered not as ends in themselves but only when necessary to attack problems impeding instructional progress. In this way, instruction would be primary, but all services found by a needs assessment to be needed to solve instructional problems could be provided without artificial restriction.

Program planners, nonetheless, have considerable discretion. They may implement their own theories concerning the relative priority of general areas or attempt to gather empirical data as to whether, for example, reading is needed more than mathematics. However, program planners need not justify their selection of general instructional areas in terms of such data. LEAs may select different general instructional areas for different general target groups (reading in grades 1-3, mathematics in grades 5-7, motor skills for trainable mentally retarded children, etc.). Also, in determining the number of general instructional areas in which to offer Title I services program planners must consider the limitations imposed by resource constraints.

2. Step 4 -- Discover the educationally deprived children--and Step 5 -- Discover those most in need of special assistance.

Once the general target groups and general instructional areas are chosen, the next step, Step 4, is to discover which of the children in the selected groups are educationally deprived in the general instructional areas, §116a.21(c). Each LEA application must indicate that

> The local educational agency, using appropriate data and specified criteria, has identified all of the educationally deprived children in the project areas, who are in the age or grade levels and have the types of educational needs identified in accordance with [Steps 2 and 3].

This needs assessment step must be based on empirical evidence which indicates the children whose level of educational attainment in the general instructional areas is below that appropriate for children of their age.[113]

Following, or simultaneous with, Step 4, LEAs must discover which of the educationally deprived children are most in need of special assistance (§116a.21(d)). This needs assessment step, Step 5, must also be based on empirical evidence. The regulations imply that this evidence may be the sam as that used in Step 4 unless additional evidence is needed. Under §116a.21(d), the LEA application must indicate that

> The local educational agency has secured any additional objective data which, in combination with the existing data... will enable it to identify which of the educationally deprived children identified...are most in need of special assistance.

The determination of those having the greatest need requires only comparison of the educational attainment of children within the same targeted general group. LEAs do not have to "determine," for example, whether an individual seventh grade student has greater need than an individual third grade student. Furthermore, LEAs may identify the children according to greatest need within each general instructional area, or, if the LEA has made a firm decision to offer instructional services to a targeted group in more than one area, the LEA may identify the children according to greatest need as shown by a composite indicator which reflects aggregate need.

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[113] The term "educationally deprived children," as defined in the regulations (45 C.F.R. §116a.1(1976), means "(1) children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age, and (2)children who are handicapped."

3. Step 6 -- Decide the program participants, employing specific criteria.

Step 4 and 5 are the needs assessment steps which form the basis for the second part of the two-part targeting decision. This targeting decision is, thus, Step 6 of the program development process. In Step 6, LEAs determine which of the children in the targeted general groups will be selected, according to established criteria, for actual participation in the Title I program. §116a.21(e) states that LEA applications must indicate that

> The local educational agency has set forth specific criteria by which the educationally deprived children residing in the project areas and all children in institutions for neglected or delinquent children counted for payment under this part will be chosen to receive Title I services. [emphasis added]

Step 6 must be based on the policy of selecting first those who have the greatest need, as indicated in Step 5, or those who participated in the Title I program during the previous year if such children are still educationally deprived (see the chapter on targeting). §116a.21(e) provides that:

> Educationally deprived children chosen may include those identified as having the greatest need...and those residing in a project area who participated in a project conducted in the previous year (if such children are still educationally deprived). A child may not be excluded from participating in a project because he or she is not from a low-income family or not attending school at the time.

Resource constraints determine the number of children who may participate because Title I funds must be "concentrated." (See the chapter on concentration.) Among targeted groups LEAs may allocate funds according to the value preferences of the program planners. Within a targeted group, however, children most in need, as identified in Step 5, must be selected until the funds allocated to the group are exhausted.

Step 6 is a premise for subsequent needs assessment steps. Once the actual program participants have been selected, only they need be included in the more detailed inquiries required by Steps 7 and 8.

4. Step 7 -- Discover in greater detail the needs of the targeted children in general instructional area-- and Step 8 -- Discover other contributing factors.

Under §116a.21(f) of the regulations LEA applications must demonstrate that

> the local educational agency has used adequate diagnostic procedures to determine the special educational needs of the children chosen to be served in a Title I project. [emphasis added]

There are two steps implicit in this concept of diagnosis: greater refinement of the initial inquiry into needs and analysis of the origins of needs and the factors contributing to them.

Thus, Step 7 of the program development process discovers, in greater detail, the incidence and severity of the participating children's needs with respect to components of the general instructional areas in which they will receive instructional services. (Vocabulary, for example, might be a component of reading.)

Step 7 bears some resemblance to Step 1 and Step 4--all are empirical inquiries concerning the academic achievement of children. Step 7, however, must be a more refined and in-depth inquiry, as its purpose is not just to either conduct a general review or simply determine who should receive services, but to discover in detail which precise needs must be met.

Step 8, simultaneous with, or perhaps subsequent to, Step 7, is an attempt to discover--as accurately as possible through a process of empirical inquiry and analysis--other factors contributing to the participating children's educational deprivation and needs. This step reveals the non-instructional needs that must be met (see the discussion, supra, concerning the relationship that must exist between support services and educational needs, as analyzed by the Title I legislative history), and provides insights concerning the activities, services, and strategies that will maximize the likelihood that the program will successfully meet the children's instructional needs. (§116a.22(b)(2) requires that project activities show reasonable promise of accomplishing the project objectives; project objectives, in turn, must be related to the needs identified in the needs assessment.) This step must be an open, unconfined inquiry which is based on empirical information interpreted in light of educational theory. (See the example, supra, n. 110).

§116a.22(b)(5) states that Title I projects must be "concentrated on a sufficiently limited number of services . . . to show reasonable promise of meeting the educational objectives" of the project. Since resources are limited, efforts must be concentrated on the most important services. The empirical evidence gathered and analyzed in Steps 7 and 8 must be the primary basis for this decision. Instructional needs must be ranked according to their severity and incidence. Non-instructional needs must be ranked according to the importance of their relationship to the high priority instructional needs.[114]

5. Step 9 -- Decide the objectives and sub-objectives--and Step 10 -- Decide the activities and services.

The discovering of needs leads directly to the establishment of objectives and sub-objectives of Title I program, Step 9.

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[114] Thus, a non-instructional need cannot be a high priority simply because it is present, or even because it is pervasive. The non-instructional need must be thought to be significantly related, as a contributing factor, to instructional needs. The absence of indoor plumbing might be pervasive, but unless this need is linked to instructional priorities, it cannot be deemed a high priority *for Title I*.

The current legal framework includes some provisions that can be satisfied only by objectives having a broad, general scope, and includes others that require objectives having a scope which is narrow but directly related to the accomplishment of the broader objectives. Both types of provisions refer to "objectives," and this is a source of confusion and difficulty, since objectives which satisfy one type of provision generally do not satisfy the other. For purposes of clarity we use the term "objective" when referring to objectives which concern the full scope of a general instructional area (such as reading) and the term "sub-objective" when referring to objectives which concern a component of a general instructional area (such as vocabulary). With the terms defined in this way it is clear that the current legal framework requires LEAs to establish both objectives and sub-objectives.

§§151(d) and 151(f) of the Title I statute require objectives having a broad, general scope. These provisions state that Title I projects must be designed so that they can be evaluated by federally-established "uniform procedures and criteria" which will generate "data . . . comparable on a statewide and nationwide basis." Since objectives are the basis of an evaluation, a Title I project must have general objectives suitable for this purpose.

At the same time, Title I projects must be directly responsive to the particular, and perhaps unique, needs identified in the needs assessment. For program design purposes, objectives having a highly specific, narrow scope must be formulated. §116a.22(b)(1) of the regulations requires LEA applications to demonstrate that

> the educational objectives of the project are adequately related to one or more of the special educational needs of the participating children as identified in accordance with [needs assessment].

The needs assessment requirements, (§116a.21(f)), of course, requires that needs be identified with considerable refinement, that they be identified by "diagnostic procedures."115/

115/ Several OE documents, now superseded, discussed the need for sub-objectives as well as objectives (though without using the term "sub-objective"). §4.3 of *Program Guide #44* stated, "the compensatory education objectives . . . should be . . . stated in terms of the types of changes that are sought . . . as a result of *each major activity*." (Emphasis added.) OE's *Handbook on Performance Objectives*, at 7, amplified the requirement that objectives be formulated for each major activity in an academic area, not just for the academic area as a whole:

> While the long-range, broadly stated goal of the program might relate to improvement in a particular academic area, the performance objectives which are written for the program are much more specific and narrow in scope, and concentrate on a particular activity or behavior designed to lead to the improvement desired, i.e., the program goal.

The handbook continued, saying, at 15, "objectives are usually very specific and have intentional end results," an at 16, that objectives "should be specified by verbs or action words which should be open to as few interpretations as possible."

Thus, both objectives and sub-objectives are needed. Taken as a whole, the sub-objectives must be designed to span the full scope of the objective they support so that accomplishment of the sub-objectives maximizes the likelihood that the objective, too, will be reached. The purpose of this requirement is to prevent gaps in instructional services which could defeat the accomplishment of objectives in spite of the success of the program components that are offered. This requirement also facilitates analysis of the reasons why a particular objective was not attained, should that occur. If sub-objectives span the full scope of an objective, failure to attain the objective should be traceable to failure to attain one or more of the sub-objectives, thus, providing specific information as to the areas in which the program needs to be strengthened.

(footnote continued from previous page)

Title I ESEA: How It Works, at 38, included examples of both broad and narrow objectives. After indicating that for a reading project a broad objective concerning "reading achievement" is needed, the document continued, saying "separate objectives must be written for each project and for each behavioral outcome anticipated." The OE document illustrated the concept of "behavioral outcome" objectives by utilizing the example of a field trip having objectives with a very narrow scope. "The objective for...field trips, with the intended behavioral outcome of improving students' self-image, may be to expose students to five different job categories."

Once the objectives and sub-objectives are established, an LEA must decide which activities and services (instructional and noninstructional) are necessary, sufficient, and best able to accomplish those ends. Since programs which address underlying factors contributing to learning problems will be more successful than superficial efforts, this program design step, Step 10, must be based on the results of Step 8. Educational theory -- particularly lessons from evaluations of past Title I activities and services -- must supplement the analysis of contributing factors. Both types of information must be effectiely utilized so that the most promising program can be designed.

Resource constraints necessarily limit the extent to which activities and services can be provided to the program participants, but the primary impact of resource constraints must fall on the number of participants selected in Step 5 and the number of general instructional areas selected for emphasis in Step 2. Participants and general instructional areas must be limited so that sufficient funds are available to provide all the activities and services which will ensure each program participant a fully adequate opportunity to accomplish the established objectives. §116a.22(b)(2) requires each LEA application to demonstrate that

> the resources to be used in the project and the plans for their use are consistent with and show reasonable promise of meeting the objectives of the project.

Title I requires LEAs to provide ample activities and services to a limited number of children in a limited number of general instructional areas, rather than to offer inadequate and diffuse services or activities to a larger number of children.

IV. Summary of the Program Development Steps

The table below summarizes the program development steps which LEAs must take. The left hand column identifies and orders the program development steps and indicates in parentheses the program requirement which is the source of the step. Corresponding entries in the right hand column identify the previous steps, if any, on which a given step is premised and the types of information or categories of input on which the step must be based.

Program Development Step	Basis: Previous Steps, Information Input
1. Determine the general incidence and severity of educational deprivation in all eligible attendance areas (needs assessment).	1. This step is based on a review of existing information, both empirical data (performance of children in school programs) and educational theory (insights gained from evaluations of past programs).
2. Decide the general instructional areas -- reading, language arts, mathematics, etc. -- in which instructional services will be provided (program design).	2. Instructional services must reflect emphasis on basic instructional needs, but the selection of particular general instructional areas may be based on value preferences, educational theory as to the areas in which

Program Development Step	Basis: Previous Steps, Information, Input
	the program is likely to be most effective, or empirical evidence of relative need. Consideration of resource constraints guides the determination of the number of different areas in which instructional services can be offered.
3. Decide the general groups of children who will be considered for participation in the program; general groups means grade spans, and such groups as handicapped children, dropouts, EMR or TMR children, neglected and delinquent children, bilingual children, etc. (targeting).	3. The decision as to which general groups to target may be based on value preferences, educational theory as to the effectiveness of intervention at a particular grade level, or empirical evidence of relative need.
4. Discover which of the children in each targeted general group are educationally deprived in the general instructional areas selected for emphasis. (needs assessment).	4. This needs assessment step is directly premised on Step 2 and Step 3. Within these outer parameters, this step must be an empirical inquiry which identifies the children performing below the level appropriate for their age.
5. Discover which of the educationally deprived children have the greatest need (needs assessment).	5. This step is premised on Step 4 and must be based on empirical evidence. Only children within the same general target group need be compared with each other.
6. Decide which children within each targeted general group will actually participate in the program (targeting).	6. This decision must be based on the policy of serving first those in each general target group who have the greatest need as identified in Step 5. Analysis of resource constraints must guide the decision as to the number of children who will participate; this is to ensure that services will be adequately concentrated.

Program Development Step	Basis: Previous Steps, Information, Input
7. Discover the incidence and severity of the needs of program participants in each component of each general instructional area (needs assessment).	7. Step 2 determines the subject areas; Step 6 determines the children involved in this step. Within these limits this step is an empirical inquiry, similar to Step 3, but more refined and in-depth.
8. Determine (through a process involving both discovery and decision) the causes of the participants' educational deprivation and needs (needs assessment).	8. This determination must be thoroughly grounded in an open and unconfined empirical inquiry into causal factors impeding the learning progress of the children. It is this step which identifies the non-instructional needs which must be met. The empirical information gathered should be interpreted according to relevant educational theory.
9. Decide the objectives and sub-objectives of the program (program design).	9. This decision must be based on the policy of meeting the needs as determined in Step 8. Sub-objectives must be numerous and specific and must as a group span the full scope of the objectives.
10. Decide the activities and services that will be provided to attain the objectives and sub-objectives (program design).	10. The activities and services necessary, sufficient, and best able to accomplish the program objectives and sub-objectives must be the ones chosen. This decision must be based on the analysis in Step 8 and consideration of educational theory (particularly past program evaluations). Resource constraints necessarily limit the extent to which activities and services can be funded, but the primary impact of resource constraints must concern the number of participants (Step 6) and the number of general instructional areas (Step 2), not the extent to which necessary activities and services are provided.

Chapter 4

ELIGIBILITY AND TARGETING OF CHILDREN REQUIREMENTS

Chapter 4

Eligibility and Targeting of Children Requirements

I. Introduction

The eligibility of *school districts* and *school attendance areas* to participate in programs under Title I is generally based on *economic criteria*, i.e., the number of children from low-income families residing in a school district and in a school attendance area, respectively. However, the purpose of Title I, as set forth in the legislation, is to provide financial assistance to LEAs to meet the special educational needs of *educationally deprived children who reside in low-income areas*. Therefore, the regulations provide that after project areas have been chosen, *educational deprivation* and not *economic deprivation* is the sole criterion for determining which students are eligible to participate in Title I programs and for selecting from among the eligible children, which children are actually to participate in programs under Title I. With respect to selecting which children will actually participate in a Title I program, the regulations also provide that the LEA must generally select those who are "most in need" of assistance.

In other words, there are three basic criteria (subject to certain exceptions described *infra*.) a child must meet to be selected for participation in a Title I program. First, the child must reside in a project area. Second, the child must be educationally deprived, regardless of the wealth of the child's family. Third, the child must be most in need of assistance.

The first criteria, i.e., the child must reside in a project area, was fully described in a previous chapter. The purpose of this chapter is to explain the rules relating to the second criteria and the third criteria concerning the eligibility and targeting of children.

II. General Rules Concerning the Determination of Eligible Children

A. Introduction

The Title I legislation [116] provides financial assistance to LEAs to meet the "special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." Thus, the Title I statute specifies the class of intended beneficiaries--educationally deprived children residing in low-income areas. The previous chapter described the requirements concerning the residency of children in low-income areas. This section of the paper will describe the standards and definitions set forth in the regulations with respect to (a) the term "child" or "children," and (b) the term "educationally deprived children," including a discussion of the categories of children which are covered or which are not covered by this definition.

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[116] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

B. The Term "Child" or "Children"

Under the Title I regulations[117] the term "child" or "children", "except where otherwise specified means a person or persons not above 21 years of age who, under State law, are entitled to free public education which is provided as elementary and secondary education, not above grade 12. The term also includes a person or persons who are of preschool age."

This broad definition of the term "child" provides the basis for the Title I needs assessment requirement (discussed in detail *infra.*) that the LEA's assessment of the needs of children in the district include: (a) children enrolled in private schools, (b) preschool children, (c) children of school age not enrolled in school, (d) children enrolled in local institutions for neglected and delinquent children, as well as (e) children enrolled in public schools.[118]

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[117] 45 C.F.R. §116.2(a)(1976). The definition includes preschool children to conform with Section 101 of Title I (20 U.S.C. 241a) which expressly provides for the use of Title I funds for preschool programs.

[118] 45 C.F.R. §116a.21(a)(1976).

C. The Term "Educationally Deprived"

The Title I statute does not define the term "educationally deprived children." However, the term is defined in the Title I regulations[119] to mean "(1) children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age, and (2) children who are handicapped."

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[119] 45 C.F.R. §116a.2(1976). The question has been raised whether Title I funds may be used to meet the needs of "underachievers." OE has responded to this query in the following fashion. "The term 'underachiever' is used to describe children whose performance is considered not to be commensurate with their potential . . . . The children in Title I programs in general tend to be 'underachievers' but the starting point for a Title I program is the identification of the children who are 'below grade level' . . .": A second issue posed to OE concerned the question of whether the federal regulations permit children whose test scores are at the 50th percentile or above to be involved in a college bound program funded by Title I. OE, in response to this query (1976) explained that the definition of "'educationally deprived children' as stated in the Title I regulations . . . does not extend to children scoring above the 50th percentile on the instrument the local educational agency has chosen to identify its educationally deprived children. . . the inclusion of children above the 50th percentile is contrary to the LEA's own operational definition of 'educationally deprived children' and preempts Title I funds that could otherwise be used for other educationally deprived children who are not being served. Children who would qualify for 'advance placement classes' are not 'educationally deprived'."

There are three important points contained in this definition requiring special emphasis. First, in order to be eligible, children must "have a need for special educationa assistance in order that their level of educational attainment may be raised to that appropriate for children of their age." Thus, children who are poor or who are culturally, racially, or linguistically isolated from the community at large *but* who do *not* satisfy the criteria set forth above are *not* eligible for assistance under Title I.[120]

Second, the regulations reiterate a point which should now be clear: although school attendance areas are selected on the basis of economic criteria, children residing in project areas are selected on the basis of *educational deprivation*, irrespective of the wealth of their parents.[121] Specifically, the regulations provide that "a child may not be excluded from participating in a project because he or she is not from a low-income family . . ."

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[120] The definition of the term "educationally deprived children "set forth in the *old* regulations (45 C.F.R. §116.1(i)(1974)) included a statement specifying possible causal factors for a child's educational deprivation, such as "poverty; neglect, delinquency, or cultural or linguistic isolation from the community at large. The inclusion of these "causal factors" was misconstrued by some persons to mean that if a child was "linguistically isolated" or poor he/she would be deemed eligible, irrespective of the child's level of educational attainment. The revised regulations, as quoted in the text, have deleted this statement of causal factors.

[121] 45 C.F.R. §116a.21(e)(1976).

Finally, handicapped children are considered educationally deprived for purposes of Title I. The significance of this inclusion in the definition is discussed *infra*, at page 94, footnote 124.

III. General Rules Concerning the Targeting of Program Participants

Since Title I has never been fully funded by Congress, it is generally the case that an LEA will be unable to serve all educationally deprived children residing in low-income areas. Therefore, the LEA must select from among the eligible children those children who will actually participate in the Title I program. The decision to select or "target" such children involves two steps. The regulations[122] require that a LEA application contain "sufficient information and documentation" to enable the SEA to determine that these steps have been taken.

First, a LEA, based on a review of "existing data . . . on the performance in the agency's basic programs of instruction of [eligible] children"[123] must select the "age or grade levels at which it will operate the Title I project (or projects)".

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[122] 45 C.F.R. §116a.21(e)(1976).

[123] 45 C.F.R. §116a.21(a)(1976).

For example, the LEA may choose to serve only those children in grades K-6. It may choose to serve handicapped children, or it may choose not to.[124]

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[124] 45 C.F.R. §116a.21(b)

If LEAs were required to *target general groups on the* basis of those that are furthest behind (see *infra*,), Title I would *have to* be used to fully meet the needs of trainable and educable mentally retarded children before other groups' needs could be considered. OE, in discussing handicapped children, has indicated that this need not be done.

In 1972, OE issued *Program Guide #78* entitled, "Benefits for Handicapped Children in Local Public Schools under Title I, ESEA." The guideline was divided into two sections, the first section concerned states which have *not* passed mandatory special education legislation, the second section concerned states which have passed mandatory special education legislation.

With respect to states which have *not* passed mandatory special education legislation, the guideline provided that Title I funds *may be* used to fund, in whole or in part, special education programs for children residing in project areas. An implication from this guideline was that LEAs may, but are *not* required, to target all special education children. although generally these children will be "furthest behind."

In those states which have passed mandatory special education legislation, the guideline provided that Title I funds may be provided for projects or components of projects "which extend beyond those required by law to be provided through state or local funds." In other words, the LEA *may* provide supplementary services, but in no case may supplant services provided under the special education legislation. This policy is not expressly set forth in the regulations pertaining to the supplanting provisions. LEAs must comply with 45 C.F.R. §116.40 (b)(1976), entitled "Services which applicant is required to provide." This sub-section, §116.40(b), prohibits the use of Title I funds for services which a LEA is required to provide (1) by State law, (2) pursuant to a formal determination under Title VI. VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 (Pub. L. 92-318), or Section 504 of the Vocational Rehabilitation Act of 1973, as amended or (3) pursuant to a final order of a court. Handicapped children may still be served under Title I, but any use of Title I funds for this purpose is subject to 45 C.F.R. §116.40(b).

Second, the LEA must determine the children within these groups that will be selected to participate in the Title I program. The children selected must be the educationally deprived children in each group that are "most in need" of special assistance.[125]

IV. Exceptions to the Child Eligibility and/or Targeting Provisions

A. Targeting Prior Participants

The revised regulations[126] specify one situation in which an LEA may, at its discretion, target children who are not "most in need" of assistance. Three criteria must be met before a LEA may select such children to participate in the Title I program. Such children must (1) reside in the project area, (2) have participated in a project conducted in the previous year, i.e., identified as being "most in need" during the previous year and (3) still be educationally deprived, i.e., still be performing below the level appropriate for their age level.

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[125] 45 C.F.R. §116a.21(d)(1976).

[126] 45 C.F.R. §116a.21(e)(1976). The comments preceding the regulations explain that this exception to "the greatest need" targeting standard was added to give LEAs the discretion to serve such children. See Comment 5 to §116a.21, 41 FR 42898 (September 28, 1976). That OE did not intend to distinguish between children "most in need" and those with "the greatest need" can be inferred from the synonymous usage of these terms in the regulations. Compare 45 C.F.R. §116a.21(d)(1976) with 45 C.F.R. §116a.21(e)(1976).

B. Participation By Children From Outside The Project Area

As explained *supra*, the general school attendance area rules provide that only educationally deprived children residing in project areas may participate in Title I programs. However, the regulations include an exception which, under certain *limited* circumstances, authorizes participation by eligible children who do *not* reside in the project area. The regulations set out four criteria that must be met before such children may participate in a Title I project. SEAs are required to determine that the criteria are met before finding that a project may be found to be of "sufficient size, scope, and quality."[127/] The established criteria are

- o the children meet all other participation criteria other than residency
- o their participation will *not result in the exclusion of children from the project* area who meet participation criteria
- o the project has been designed for the selected children from the project area and,
- o such participation will neither impair the effectiveness of the project *nor result in any extra* cost.[128/]

[127/] 45 C.F.R. §116a.22(b)(1976) provides, in part, that a SEA shall not approve an application unless it determines that the project is of "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of [participating] children."

[128/] 45 C.F.R. §116a.22(b)(9)(i)(ii)(iii)(iv)(1976). The comments preceding the regulation state that even if these criteria are met, the LEA "*has the discretion to not serve such children*." *See* Comment to §116a.19, 41 FR 42397-42898 (September 28, 1976).

Chapter 5

NEEDS ASSESSMENT

Chapter 5

NEEDS ASSESSMENT

I. Introduction

The Title I legislation[129] requires, in part, that programs and projects must be "designed to meet the special educational needs of educationally deprived children." LEAs must conduct a comprehensive needs assessment in order to design programs or projects which will meet the "special educational needs" of educationally deprived children residing in low-income areas. The needs assessment requirement, as set forth in the regulations, prescribes a process of inquiry and analysis which has two major interrelated purposes. The first purpose is to generate data on which to base child targeting decisions. To this end, data is gathered to identify the children who are educationally deprived and "most in need" in general instructional areas.

The second purpose of the needs assessment requirement is to generate data on which to base program design decisions. To this end, data is reviewed which will aid in determining in greater detail the incidence and severity of the needs of actual program participants. This process includes an attempt to determine the factors contributing to children's learning problems. This will enable the LEA to design programs which will address the special educational needs of the program participants.

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[129] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)).

This chapter will describe (1) the general purposes of the needs assessment requirement set forth in the regulations; (2) the requirement that needs assessment be undertaken in consultation with specified persons; and (3) the scope of needs assessment information which must be provided to SEAs.

II. Purposes of the Needs Assessment Requirement

A. Purpose 1: Generate Data for Child Targeting Decisions

The first step LEAs must follow to generate data for child targeting decisions is to review "appropriate existing data"[130] including, but not limited to, past Title I evaluations and "data on the performance in the [LEA's] basic programs of instruction of children residing in all eligible attendance areas."[131]

130/ The Comments to the revised regulations indicate that:

> where feasible, the use of existing data is authorized to ease the annual data-gathering burden on [LEAs]. However, since eligible attendance areas may change every year, and annual evaluations required by the statute must be examined to make appropriate changes to the project, some data will probably need to be collected every year. Comment 1 to §116a.21, 41 FR 42898 (September 28, 1976).

131/ 45 C.F.R. §116a.21(a)(1976). The needs assessment section of the proposed regulations (§166a.21, 40 FR 11482, March 11, 1975) had required that the educational deficiencies of children in reading, written communication and mathematics be documented for purposes of generating data for child targeting decisions. Commentors to the revised regulations indicated that the emphasis on reading and mathematics was too restrictive. Consequently, the generic phrase "basic programs of instruction" was incorporated in the revised regulations to give the LEAs "more flexibility in performing their needs assessments." Comment 2 to §116a.21, 41 FR 42898 (September 28, 1976).

This must be done to "determine the incidence and severity of educational deprivation among all children residing in an eligible attendance area."[132] (Emphasis added.) The scope of this required review includes (1) children enrolled in public schools; (2) children enrolled in private schools; (3) pre-school children; (4) children of school age not enrolled in schools; and (5) children in local institutions for neglected or delinquent children.[133]

The LEA, based on its review of existing data, must then select the general groups of children that will be considered for participation in the Title I program, e.g., the "age or grade levels at which it will operate the Title I project (or projects)."[134] (A decision which must be made concurrently is the identification of the types of educational needs the Title I program will focus on. This decision falls within the second purpose of the needs assessment requirement, i.e. generate data for program design decisions, and will be discussed in the next section.)

Once the general target groups of children have been chosen, a LEA must identify all the educationally deprived children within the project area who are in the selected age or grade levels and who have the types of educational needs the Title I project will address.[135]

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[132] 45 C.F.R. §116a.21(a)(1976).

[133] Id.

[134] 45 C.F.R. §116a.21(b)(2)(1976). It is important to note that on various occasions, OE has expressly permitted SEAs to limit the discretion of the LEAs within their state with respect to the determination of which grade

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(footnote continued from previous page)

> spans may participate in Title I funded programs. OE based this authority to set such guidelines on the SEAs' legal responsibility to determine whether an application has "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs" of educationally deprived children. 45 C.F.R. §116a.22(b)(1976).
>
> This rationale was recently employed in a letter to a Senator concerning an SEA requirement that LEAs use standardized tests as criteria for the final selection of students. This letter (1976) provided, in relevant part, that
>
> > "while we have refrained from prescribing particular types of measurements, we have consistently held that it is within the authority of the SEA to set basic requirements concerning the selection of participants in Title I programs . . . . On the basis of its knowledge of sources of information available to the applicant LEAs on the educational status of pupils, the SEA may require a standardized test score for final selection of the students who are to receive services and approve only those applications which meet this requirement."

[135] 45 C.F.R. §116a.21(c)(1976).

Following, or simultaneous with, this decision, LEAs must secure necessary "additional objective data" for purposes of identifying which of these children are "most in need of special assistance".[136/] This determination requires comparison

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136/ 45 C.F.R. §116a.21(d)(1976). On numerous occasions OE has interpreted the phrase "greatest need" to be synonymous with "most in need", i.e., furthest behind. For example, a 1974 OE letter explained that:

> although the needs assessment provides a basis for the criteria for selection of educationally deprived children, actual practices discovered skewed the selection of children in favor of those with more potential rather than those with the greatest educational deficiencies. To illustrate: the instructions to teachers for the selection of participants in the Title I reading classes . . . included in effect the statements, 'select those most likely to succeed' and 'within the identified group select those with potential to progress.' It is recommended that Title I participants be selected according to two factors: the number of needs or deficiencies and the intensity of these needs. Children should be ranked sequentially according to these factors and selected in order of need, the greater to the lesser.

The confusion concerning the meaning of the phrase "greatest need for assistance" to include children who showed "potential for success" may have arisen as a result of a sentence which appeared in Program Guide #44, Section 4.2 which provided that: "Title I resources should be concentrated on those children who are most in need of special assistance. Normally this process will involve determinations of both the needs of individual groups of children and of the possibilities for success in working with those groups."

of the educational achievement of children within the general targeted groups. For example, if the third grade is the selected grade level at which the LEA will operate the Title I program, identification of those children "most in need" will involve comparison of individual third grade students. It will not require comparison with students of another grade level.

B. Purpose 2: Generate Data for Program Design Decisions

After an LEA has reviewed existing data to determine the "incidence and severity of educational deprivation" in eligible attendance areas, it must determine the "types of educational needs to be addressed by these [Title I] projects."[137/] This determination, as explained *supra*, must be made concurrently with the decision as to which age or grade levels the Title I project will focus on.

Once the actual program participants have been chosen (those who are "most in need" and who otherwise qualify for selection -- see chapter on Targeting), the LEA must use "adequate diagnostic procedures to determine the special educational needs of the children to be served."[138/] This determination is a more

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[137/] 45 C.F.R. §116a.21(b)(1976).

[138/] 45 C.F.R. §116a.21(f)(1976). An SEA, in 1975, requested clarification from OE concerning the use of Title I funds for satisfying various aspects of the needs assessment process. OE explained that "testing of all children in an eligible Title I school is not a permissible expenditure of Title I funds.... Once the educationally disadvantaged children have been identified by the target school, Title I funds may be used to gather additional data to diagnose their particular needs, to determine the specific services to be offered, and, based on such data, to select from the educationally disadvantaged, those children who will actually receive services corresponding to their needs."

detailed analysis of the incidence and severity of the participating children's educational needs with respect to selected instructional areas for Title I focus.[139] A related needs assessment requirement is to discover other factors contributing to the program participants' educational needs, e.g., non-instructional needs which must be met.[140]

III. Consultation Requirement

At every stage of the needs assessment process, the LEA

139/ The selection of instructional areas for Title I focus is described in the chapter on Program Design, pp. 109.

140/ *See* chapter on Program Development for a discussion on the relationship between non-instructional and instructional needs, pp. 78.

must, to the extent feasible, consult with "teachers, parents, and persons knowledgeable of the needs of private and public school children and children in local institutions for neglected or delinquent children."[141]

IV. Scope of Information Provided to SEAs in the LEA Application

The regulations[142] require that the LEA's annual application contain "sufficient information and documentation" to enable the SEA to determine that the LEA has taken the required needs assessment steps which are described in this chapter.

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[141] 45 C.F.R. §116a.21(g)(1976). The consultation requirement is also discussed in relation to other Title I requirements.

[142] 45 C.F.R. §116a.21(1976).

Chapter 6

PROGRAM DESIGN

Chapter 6

PROGRAM DESIGN

I. Introduction

Program design is one of the three components of the program development process. The other two components are the targeting of children and needs assessment.

Section 141(a)(1) (A) of Title I (20 U.S.C. 241e(a)(1)(A)) provides that Title I projects must be specifically "designed to meet the special educational needs of educationally deprived children . . ." (emphasis added). Although the Title I legal framework does not require that any particular kind of program design be employed, some minimum process standards are inherent in the legal provisions.

The minimum standards include (a) the "project" requirement; (b) the educational "objectives" requirement; (c) the program "scope" requirement; and (d) the program "quality" requirement.

II. The Project Requirement

Congress determined that the Title I statute should not establish a general-aid-to-education program. Rather, Title I funds must be spent for discrete projects. Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)) indicates, in part, that such projects must be specifically designed to meet three statutory criteria, i.e., "sufficient size, scope, and quality." First, projects must be of "sufficient size" so that the project participants receive concentrated services.[143/] Second, Title I projects must be of "sufficient . . . scope" to provide a balanced variety of services so that all the factors contributing to the learning problems of participating children may be successfully addressed. Third, Title I projects must be of "sufficient . . . quality" to be successful compensatory education programs.

The statutory requirement that Title I funds be used for discrete programs and projects is implemented by 45 C.F.R. §116a.22(b)(1976) which indicates that

> a [SEA] shall not approve a project for which an application has been made unless it determines that the project is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of [participating] children.

[143/] See infra, pp. 125-132 for a description of the concentration requirement.

III. The Educational Objectives Requirement

One of the most important standards related to project design is the requirement that educational objectives be established for each Title I project.

In approaching the formulation of educational objectives, LEAs must use "adequate diagnostic procedures to determine the special educational needs of the children chosen to be served in a Title I project."[144] The LEA must then establish (1) the "educational objectives" of the project; and (2) the relationship of these objectives to the educatinal needs identified by the required diagnostic procedures.[145]

This information must, in turn, be described in the LEA's application "in sufficient detail"[146] to enable the SEA to determine that the educational objectives established are "adequately related to one or more of the special educational needs of the participating children as identified [by the required needs assessment]."[147] If the SEA does not make such a determination, it must not approve the application.[148]

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[144] 45 C.F.R. §116a.21(f)(1976). See 45 C.F.R. §116a.21(b) (1976) which has implications for program design because it requires LEAs to select the age or grade levels at which it will operate the Title I project and the types of educational needs to be addressed by the project.

[145] 45 C.F.R. §116a.22(a)(1)(1976).

[146] 45 C.F.R. §116a.22(a)(1976).

With respect to educational objectives, other parts of the Title I legal framework clearly indicate that educational objectives must be performance objectives.[149] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)) requires evaluation reports "relating to performance" which must be "in accordance with specific performance criteria related to program objectives." Section 141(a)(6) of Title I (20 U.S.C. 241e(a)(6)) requires that the evaluations include "objective measurements of educational achievement."

IV. The Program "Scope" Requirement

As explained *supra*, LEA programs must be of "sufficient . . . scope . . . to give reasonable promise of substantial progress" toward meeting the needs of Title I program participants. The requirement for programs of "sufficient scope" concerns the focus of Title I programs and the coordination of Title I with the regular school program.

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[147] 45 C.F.R. §116a.22(b)(1)(1976.

[148] 45 C.F.R. §116a.22(b)(1976).

[149] To assist LEAs in designing their programs, OE prepared a handbook, now superseded, entitled *Title I Performance Objectives*.

A. The Focus of Title I Programs and Projects

The Declaration of Policy found at §101 of Title I provides that Title I funds are to be used for educational programs "which contribute particularly to meeting the special educational needs of educationally deprived children."

The definition of educationally deprived children in the regulations[150] implements this Congressional intent,

> 'Educationally deprived children' means (1) children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age, and (2) children who are handicapped [Emphasis added.]

Thus, it is clear that the primary focus of Title I is on educational programs to meet the special educational needs of participating children in order to raise their educational attainment to a level appropriate for their age. It is equally clear that the required needs assessment may reveal learning problems which have multiple causes and contributing factors. For example, the required "adequate diagnostic procedures"[151] could indicate that problems of poor vision, health, lack of adequate nutrition or clothing are inextricably intertwined with a child's "special educational needs" and, therefore, must be addressed in order to raise a child's "educational attainment" to a level appropriate for his/her age. A needs assessment could produce similar findings in the affective domain, e.g., a child could be emotionally disturbed. Thus, to the extent that the needs assessment identifies health, clothing, nutritional, or similar needs to be significant factors contributing to learning problems, Title I programs must consider such needs high priorities. The same emphasis must be given to needs in the affective domain in such areas as behavior, attitude, and motivation. If necessary support services for participating children cannot be secured from other agencies, then Title I funds may be expended for them.[152] However, the Title I regulations provide no guidance as to when support services may be considered allowable expenditures.[153]

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[150] 45 C.F.R. §116a.2(1976).

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[151] 45 C.F.R. §116a.21(f)(1976).

[152] See 45 C.F.R. §116.41(a)(1976) which requires, in part, that each LEA application demonstrate that the applicant "has taken into consideration benefits which are or may be available through other public and private agencies, and which would contribute toward meeting the special educational needs of educationally deprived children." See also former OE Program Guides #60 and #60A which indicated that clothing and, by implication, other support services could be provided with Title I funds to needy [footnote continues]

[153] The GEPA regulations (45 C.F.R. §100b.81 and appendix B generally provide that to be allowable, costs must be necessary and reasonable for the proper and efficient administration of the program.

B. Coordination of Title I With the Regular School Program

Although the regulations require coordination of Title I with other resources[154] they provide no guidance about the extent to which the Title I program or project must be coordinated with the regular school program. However, it is clear from the "supplement, not supplant" requirement[155]

[footnote continued from preceding page]

Title I participants as part of a project designed to meet their special educational needs.

In discussing support services, the former OE publication, *Title I ESEA: How It Works* stated, at p. 3, that:

> The first paragraph of the law . . . says money will be given to local school districts to meet 'the special educational needs of educationally deprived children.'...The word 'educational' emphasizes the Federal Government's idea that Title I should be an instructional, not a welfare type,program. This does not mean that Title I services must be limited to classroom help . . . . Supportive services might include free breakfast, medical exams, dental treatment, and field trips. But because Title I is an educational program, these services must be related to some educational need.

154/ *See* the chapter on coordination, *infra*, pp. 9.

155/ *See* the chapter on the supplement, not supplant requirement, *infra*, pp. 11. OE addressed this issue in *Program Guide #44*, Section 4.1, which provided that "the Title I program, if it is to be truly *supplementary*, must be designed to extend and reinforce the regular school program. Insofar as possible, the regular school program, the Title I program, and any other special programs should be designed as a total program to meet the needs of the children to be served."

that Title I funds must be used to supplement the regular school program.

There are three ways in which Title I can complement the regular school program. First, a LEA may continue its regular educational program and add Title I services aimed at the needs which are not addressed, or which are inadequately addressed, in that program. Second, a LEA may modify its regular program to provide a better base prior to the addition of Title I services.[156] Third, a LEA may design a totally new, comprehensive educational program for targeted children and assign the costs proportionately to the regular budget and the Title I budget.[157]

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[156] Section 4.1 of Program Guide #44 required SEAs to ensure that: "Consideration has been given to the relationship of the Title I program to the regular school program and to the possibility of modifying that program so as to provide a better base for the addition of supplementary compensatory educational services."

[157] In Program Guide #48, OE stated that: "The entire school program in the project area should be planned as a special program for the disadvantaged children involved. State and local funds would then be used to pay for that portion of the program which would replace the pre-existing regular school program and Title I funds would be used to pay for additional services above that level."

V. The Program "Quality" Requirement

The quality of Title I programs is an express statutory concern. Under §141(a)(1)(B) of the Act, Title I projects must be of "sufficient . . . quality to give reasonable promise of substantial progress" toward meeting the needs of Title I program participants. The regulations[158/] implementing this statutory requirement provide in part, that a SEA "shall not approve a project for which an application has been made unless it determines that the project is of sufficient . . . quality . . . ."

This section of the chapter will discuss several factors related to program quality and will describe the extent to which the Title I legal framework imposes requirements related to these factors. These factors are(a) staff qualifications and staff organization; (b) staff training; (c) individualized written educational plans for participating children; (d) utilization of research information in program design; (e) utilization of past Title I evaluations in program design, and (f) standards concerning persons who should participate in program planning.

A. Staff Qualifications and Staff Organization

The regulations related to staffing do not contain precise

[158/] 45 C.F.R. §116a.22(b)(1976).

standards for staff qualifications or staff organization. However, several principles related to staffing issues are inherent in the regulations.

The regulations[159] provide that Title I funds may be expended "for the employment of the personnel required to provide specific services set forth in approved Title I applications." Thus, the regulations imply that there must be a clear relationship between the type of staff hired and the "specific" services that are to be provided.

Furthermore, LEA applications must contain a description of the number and the types of staff to be employed, the plans for the use of such personnel and the materials to be used in implementing the Title I project.[160] Applications must also describe, in part, "the time periods and instructional settings for the project services,"[161] the "number of children to be served and a general description of their special educational needs."[162] This information must be described "in sufficient detail to enable the [SEA]"[163] to determine that "the resources [including type of staff] to be used in the project . . . are consistent with and show reasonable promise of meeting the objectives of the project."[164] This determination must be made before the SEA may find that a project is of "sufficient size, scope, and quality . . ." (emphasis added).[165]

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[159] 45 C.F.R. §116.35(1976).

[160] 45 C.F.R. §116.35(1976). 45 C.F.R. §116a.22(a)(2)(1976).

[161] 45 C.F.R. §116a.22(a)(3)(1976).

[162] 45 C.F.R. §116a.22(a)(4)(1976).

Taken together, these requirements indicate that, in addition to whatever judgments the LEA makes about staff qualifications and organization, the SEA must make an independent determination that the proposed types of staff and plans for their use are (1) consistent with project objectives and (2) show reasonable promise of meeting those objectives. If the SEA does not make this determination [and others], then the application cannot be found to be of "sufficient quality."

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[163] 45 C.F.R. §116a.22(a)(1976).

[164] 45 C.F.R. §116a.22(b)(2)(1976).

[165] 45 C.F.R. §116a.22(b)(1976).

B. Staff Training

The Title I legal framework expressly recognizes the importance of staff training to ensure high quality Title I programs. Furthermore, the regulations provide, in part, that payment of Title I funds may be authorized for preservice and inservice training.

Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)) expressly authorizes LEA to expend Title I funds for "the training of teachers." In addition, Section 141(a)(12) of Title I (20 U.S.C. 241e(a)(12)) makes "coordinated programs of training" a mandatory component of Title I projects which involve the use of "education aides." In addition, the statute requires that both the aides and the "professional staff" they assist "participate together" in the training program. Under the regulations[166] each LEA application for a project which involves the use of education aides must indicate that it has or will provide such a training program. The regulations implement these statutory provisions through three related sections concerning (a) those eligible to participate in training, (b) the scope of training and (c) the dissemination and utilization of results of educational research. Set forth below is a description of these requirements.

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[166] 45 C.F.R. §116.34 (1976). OE reiterated in the comments to the revised regulations the statutory requirement that education aides and the professional staff they assist must jointly participate in the Title I training program. However, OE stated that "both professional staff and education aides may, of course, *also* receive separate training in accordance with [the training provisions of the Title I regulations]." Comment to §116.34 41 FR 42896 (September 28, 1976).

1. Persons eligible to participate in training

The regulations[167] indicate several categories of persons who are eligible to receive pre-service or inservice training: "(1) Title I staff members, Parent Council members, and volunteers who are engaged to perform specific services related to approved programs or projects; (2) Non-Title I staff specialists who will be dealing solely with children to be served by the Title I projects, and regular classroom teachers of such children; and (3) the principal of a school for which a Title I program or project has been approved."

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[167] 45 C.F.R. §116.36(b)(1)(2)(3)(1976). The Committee Reports accompanying the Education Amendments of 1974 contain references to the training of teachers. S. Rept. No. 93-763, 93rd Cong., 2d Sess. (1974) at p. 31 provides that "training of special educational personnel to provide the necessary compensatory education and supportive services has been a long standing Title I activity. The Committee can conceive of situations in which some supplementary training for the disadvantaged child's regular classroom teacher might be a worthwhile expenditure of Title I funds, since that teacher is also important in the child's educational development." Furthermore, it was stated in the House Report that: "It is anticipated that the type of teacher training which will be funded will include both training of specialists to deal solely with the educationally deprived and also the training of teachers who are in regular classrooms but who number the educationally deprived among their students." H.R. Rept. No. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4108.

2. The Scope of Training

The regulations[168] clearly define the authorized scope of pre-service and inservice training.[169] Such training must be directly related to the services those participating in the training "will perform during the same project year in connection with an approved program or project under Title I." In addition, the training must be directly related to the needs of such persons" for the development of competencies required if the program or project is to be effective in meeting the special educational needs of [participating] children".[170] The regulations[171] also require that pre-service and inservice training "be coordinated with any other training being provided in connection with the program or project."

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[168] 45 C.F.R. §116.36(a)(1)(1976). The comments to the revised regulations indicate that ". . . all training provided with Title I funds must directly relate to the Title I services provided to educationally deprived children and to the objectives of the Title I program serving such children." Comment to §116.36, 41 FR 42896 (September 28, 1976).

[169] An OE technical assistance packet entitled Common Characteristics of Successful Programs stressed the need to allow teachers and aides to play a cooperative role in formulating in-service training plans.

When requirements governing persons eligible to participate in training and the authorized scope of training are considered together, it is clear that (a) only specific types of personnel may participate in such training; (b) training must be directly related to services which these persons will perform in connection with an approved Title I program or project; (c) training must focus on the development of competencies these persons need to make the Title I program or project effective; (d) training for these specific types of persons must be directly related to the services to be delivered during the same project year. These requirements are designed to insure that Title I funds used for training are spent only on authorized persons for authorized purposes directly related to the current year's Title I program or project. These protective features of the training requirements are reinforced by the "supplement, not supplant" provision,[172] the equitably provided provision[173] and the general aid prohibition.[174]

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[170] 45 C.F.R. §116.36(a)(2)(1976).

[171] *Id*.

[172] See the chapter on "supplement, not supplant," *infra* at pp. 164-185.

[173] See the chapter on "equitably provided", *infra* at pp.186-196.

[174] See the chapter on "general aid" *infra*, at pp. 214-215.

3. Training and Research Dissemination

The dissemination and utilization of educational research and demonstrations is linked to training. Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10)) requires LEAs to adopt "effective procedures for acquiring and disseminating to teachers and administrators significant information derived from educational research, demonstration, and similar projects." The regulations[175] implementing this statutory provision require that each LEA application describe the methods it will use to review, select, and disseminate this information "so that such information will be available for use in program planning and operation." Among other things, these methods may include "inservice education, professional workshops and seminars, consultations and visitations, and reports on the organization, operation, and outcome of projects under Title I."[176]

C. Individualized Educational Plans

Section 141(b) of Title I (20 U.S.C. 241e-1(b)) encourages the development of individualized written plans for each project participant. Specifically, the statute indicates that

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[175] 45 C.F.R. §116.44(1976). The comments to the revised regulations indicate that "the specific training programs for [LEA] parent council members covered by §116.36, "Training," would include the dissemination of appropriate research information." Comment to §116.44, 41 FR 42897 (September 28, 1976).

[176] Id.

> It is the intent of the Congress to encourage, where feasible, the development for each educationally deprived child participating in a program under this title of an individualized written educational plan (maintained and periodically evaluated), agreed upon jointly by the local educational agency, a parent or guardian of the child, and when appropriate, the child.

The regulations[177/] reiterate this statutory provision and further state that Title I funds may be used to develop, maintain and evaluate individualized educational plan.

D. Utilization of Research Information in Program Design

As explained *supra*, LEAs are required to adopt "effective procedures" for disseminating to teachers and administrators information obtained from educational research and demonstrations. Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10)) further requires that the LEA establish effective procedures "for adopting, where appropriate promising *educational practices* developed through such projects." The regulations[178/] specify several acceptable dissemination methods including, "inservice education, professional workshops and seminars, consultations and visitations, and reports on the organization, operation, and outcome of projects under Title I."

[177/] 45 C.F.R. §116.47 (1976).

[178/] 45 C.F.R. §116.44 (1976).

E. Utilization of Evaluations of Past Title I Projects In The Program Design Process

Since the results of a LEA's past Title I evaluations are directly relevant to the design of new Title I programs, the requirement that relevant research information be considered by Title I program planners implies the use of past evaluations. Evaluations of a LEA's own programs are, in fact, just a special kind of research information.

Furthermore, the regulations[179] require that evaluations be taken into account in the needs assessment. The comments to the revised regulations[180] indicate that since these evaluations are to be taken into account, they are, therefore, "a part of the project design."

One example of how evaluations may be used in the program design process involves planning for summer school programs. Several evaluations of Title I programs specifically found that gains made during the regular year tend to be lost over the summer. These findings can be fed into the program design process and can result in a decision to conduct summer school

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179/ 45 C.F.R. §116a.21(a)(1976).

180/ Comment 3 to §116a.21, 41 FR 42899 (September 28, 1976). The same comment also explains another use of evaluations related to program design: "These evaluations may also be used in determining the appropriate size, scope, and quality of the project, but it is left to the discretion of [LEAs] and [SEAs] as to whether it is actually to be used in the manner suggested."

programs for children participating in Title I projects.[181]

F. Program Planners

The Title I statute[182] and regulations[183] require a LEA to give its parent advisory councils "responsibility for advising it in the planning for, and the implementation and evaluation of" its Title I programs and projects. Furthermore, the regulations require LEAs to include sufficient information in their application to enable the SEA to make, among other things, a determination about the involvement of parents in the needs assessment and program design decisions. Specifically, the regulations[184] state that each council must have

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181/ Section 4.4 of former Program Guide #44 required that LEAs give due consideration "to the operation of summer programs."

> Applicants should examine closely the possibility for meeting urgent needs through summer programs. The summer period provides opportunities for new activities which, while designed to overcome educational deficiency, can be more specifically and extensively adapted to the needs of children to be served. Special efforts should be made, however, to be sure that the children who participate receive assistance designed to continue the gains they have made in the preceding school year or to prepare them for the next school year's activities under the regular school or the Title I program."

182/ Section 141(a)(14)(C) of Title I (20 U.S.C. 241e(a)(14)(C)). See chapter on parent involvement, pp.144-164.

183/ 45 C.F.R. §116a.25(a)(3)(1976).

184/ 45 C.F.R. §116a.25(g)(4)(1976).

> an adequate opportunity to consider the information available concerning the special educational needs of the educationally deprived children residing in the project area (or areas), and the various programs available to meet those needs, and to make recommendations concerning those needs which should be addressed through the Title I program and similar programs.

Other than requiring parental involvement and other consultation during needs assessment, the statute and the regulations do not set standards concerning persons who should participate in Title I program planning.[185]

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[185] The need to involve Title I staff members in the design of the Title I program was stressed, however, by several federal documents which have been superseded by the current regulations. These documents identified a two-fold benefit stemming from staff involvement: improved program quality due to the expertise the staff brings to program design decision-making, and improved likelihood of success due to the greater sense of commitment to the project which staff members will have if they are involved in its original design.

OE's Handbook on Performance Objectives stressed the need to have the Title I staff determine the reasonableness of the performance objectives. OE's On-Site Visit Handbook urged SEAs to establish policies which ensure that Title I staff members are involved in the development of the project evaluation design. Another OE publication (OE-35079) indicated that the rationale for information dissemination concerning needs assessment and project design is "so that teachers and other professional staff may better contribute to the design and implementation of local projects."

Chapter 7

CONCENTRATION

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CONCENTRATION

I. Introduction

Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)) requires, in part, that LEA projects be of "sufficient . . . size to give reasonable promise of substantial progress" toward meeting the special educational needs of educationally deprived children. The regulations[186] implementing this statutory requirement provide, in part, that a SEA "shall not approve a project for which an application has been made unless it determines that the project [described by the LEA in its application] is of sufficient . . . size . . . ."

The regulations contain four general criteria related to the "sufficient size" project requirement: (1) minimum size; (2) limited services/limited children; (3) imprudent, extravagant, excessive or wasteful expenditures; and (4) participation of children from outside the project area. Since the minimum size criterion[187] is described in the chapter on LEA eligibility, the following discussion concerns the remaining three criteria.

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[186] 45 C.F.R. §116a.22(a) and (b)(1976).

[187] 45 C.F.R. §116a.22(b)(4)(i)(1976). See *supra*, pp. 45-65.

Following this discussion, this chapter describes the standards for determining concentration and the relationship of concentration to other Title I requirements.

II. The Limited Services/Limited Children Criterion

As one criterion of "sufficient size", the SEA must determine that the project described in the LEA application is

> concentrated on a sufficiently limited number of services for a sufficiently limited number of educationally deprived children, identified in accordance with [needs assessment] to show reasonable promise of meeting the [required] educational objectives . . . [Emphasis added.] [188]

This provision reflects the judgment that Title I projects will not be successful if the available funds are either spread thinly to serve too many children or used to purchase too many services in such a way that the exposure of the project participants to any one service is too brief to be effective.

To satisfy the SEA that the Title I project has been designed to concentrate on a "sufficiently limited number of services" for a "sufficiently limited number of educationally deprived children", the regulations[189] require the LEA application to describe (1) the number of children to be served and their special educational needs; (2) the resources (type of staff and materials) to be used in implementing Title I projects; (3) the plans for use of such staff and materials; and (4) the "time period and instructional settings" for Title I services.

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[188] 45 C.F.R. §116a.22(b)(5)(1976).

[189] 45 C.F.R. §116a.22(a)(2) and (3)(1976). See also 45 C.F.R. §116a.19(c)(1976) which states that Title I projects "shall be carried out at locations where the needs of the children can best be served."

III. The "Imprudent, Extravagant, Excessive, or Wasteful" Criterion

Another "sufficient size" criterion requires the SEA to determine that expenditures for the Title I project are "not imprudent, extravagant, excessive, or wasteful."[190] To aid the SEA in making this determination, the regulations[191] require that the LEA application contain a budget "detailing the expenditures required for the implementation of the project." Since such expenditures have the effect of either reducing the number of children that can be served with legitimate expenditures or imbalancing services in such a way that a comprehensive and varied program cannot be offered, this provision operates as a limit on the concentration requirement. Thus, while spreading funds thinly is a concentration violation, going to the opposite extreme and spending more than necessary amounts on too few children is "imprudent, extravagant, excessive, or wasteful."

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[190] 45 C.F.R. §116a.22(b)(4)(ii)(1976).

[191] 45 C.F.R. §116a.22(a)(6)(1976).

IV. The Participation of Children From Outside the Project Area Criteria

A third criterion related to "sufficient size" allows for participation in Title I of children from outside the designated project areas. This provision is an exception to the general policy that only educationally deprived children residing in Title I areas may participate in Title I programs. The regulations state that it may be exercised only under limited circumstances.

45 C.F.R. §116a.22(b)(7)(1976) requires that the LEA application describe "the special educational needs and number of children, if any, who reside outside the project area and who will participate, as well as the manner of their participation."

The regulations[192] set out four criteria that must be met before eligible children who reside outside a project area may participate in a Title I project. The SEAs are required to determine that these criteria have been met before a project may be found to be of "sufficient size, scope and quality." The established criteria are:

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[192] 45 C.F.R. §116a.22(b)(9). The comments preceding the text of the regulations state that even if the criteria are met the LEA "has the discretion not to serve such children." Comment to §116a.19, 41 FR 42897-42898 (September 28, 1976).

- the children meet all other participation criteria other than residency
- their participation will not result in the exclusion of children from the project area who meet these criteria
- the project has been designed solely for the selected children from the project area, and
- such participation will not impair the effectiveness of the project nor result in any extra cost.

V. Standards for Determining Concentration

A. Introduction

The regulations do not provide specific, comprehensive, mandatory standards which a SEA can use to determine that a project is concentrated on a "sufficiently limited number of services for a sufficiently limited number of educationally deprived children." This absence of standards appears to reflect OE's position that it is the responsibility of SEAs to take the initiative in promulgating standards to ensure sufficient concentration of Title I services.

Two types of standards were employed by OE in the past to enforce the concentration requirement. The first was a dollar allocation standard concerned with the overall number of dollars spent on each Title I project participant. The second type of standard was an educational effectiveness standard applied to each particular activity of a Title I project. This second type of standard consisted of either one or a combination of more detailed quantitative indicators such as the pupil-teacher ratio for the activity, the frequency with which the activity is pursued, the duration of each activity period, the number of activity periods scheduled for the project and the availability of equipment and supplies (e.g., books per pupil, movie projectors per class, etc.)

B. The Dollar Allocation Standard

Section 4.7 of former Program Guide #44 offered an explanation of the first type of standard -- a dollar allocation standard.

> The investment per child on an annual basis for a program of compensatory educational services which supplement the child's regular school activities should be expected to equal about one-half the expenditure per child from State and local funds for the applicant's regular school program

This dollar allocation standard was involved in the case of *Nicholson v. Pittenger*, 364 F. Supp. 669, 675 (E.D.Pa. 1973). Finding the defendants in violation of Program Guide #44, the court stated

> Defendants have not required . . . information from which it could be determined whether or not a program financed with Title I funds is of sufficient size . . . . Defendants have established no criteria to determine whether or not there has been adequate concentration in terms of actual Title I expenditures per child . . . . Defendants have not required . . . that for every two dollars of State and local funds allocated to a school receiving Title I funds, there is approximately one dollar of Title I funds . . . . Therefore, we shall enjoin defendants from approving any Title I applications for the School District.

The language of the "two-for-one" dollar allocation standard in §4.7 indicated that OE intended the standard to be directory rather than mandatory (despite the Nicholson court's interpretation).

C. Specific Quantitative Indicators Related to Educational Effectiveness

Section 5.1 of Program Guide #44 also described the second type of concentration standard -- an educational effectiveness standard concerning the adequacy of the staff resources devoted to a Title I project:

> The ratio of project staff to the number of children to be served should be high enough to provide concentrated, individualized services.

While former Program Guide #44 stressed the importance of providing concentrated staff services, no specific standard was offered.

VI. The Relationship of Concentration to Other Title I Requirements

The Title I concentration requirement affects the interpretation of several other Title I requirements, including targeting of attendance areas, targeting of children and program design. There are alternative means of ensuring concentrated expenditure of Title I funds. LEAs may limit Title I projects to a small number of schools or to a small number of the most severely educationally deprived children in a greater number of schools. Another alternative for LEAs is to offer instructional services in only a few general instructional areas (e.g., just in reading), thus enabling LEAs to serve either a larger number of students or attendance areas or both.

Chapter 8

LEA EVALUATION

Chapter 8

LEA EVALUATION

I. Introduction

The requirement that LEAs evaluate Title I programs and projects has two parts and purposes. The first part of the evaluation requirement provides that LEAs must make "appropriate objective measurements" of the extent to which the objectives and sub-objectives of their Title I programs have been met. The purpose of these measurements is to determine whether Title I projects have been successful.

The second part of the evaluation requirement provides that in addition to making objective measurements of the degree of program success, LEAs must also establish procedures for evaluating the effectiveness of their Title I activities and services. The purpose of this requirement is to ensure that LEAs will systematically gather and analyze information concerning why specific program activities and services were, or were not, successful and how future programs might be made more effective.

The Title I legislation and regulations establishing the basic evaluation requirement also establish standards concerning (1) the scope of information provided to SEAs in LEA Title I applications; (2) the relationship of evaluation to program design; and (3) the evaluation of private school participants. Each of these areas is discussed below.

II. The Basic Evaluation Requirement

The Title I statute[193] provides that LEAs must undertake an annual evaluation of the "effectiveness of the programs in meeting the special educational needs of educationally deprived children," including the use of "appropriate objective measurements of educational achievement."

The evaluation information must be contained in the LEA's annual report to the SEA. The statute[194] provides that the annual evaluation report must be prepared "in accordance with specific performance criteria related to program objectives."

Under the Education Amendments of 1974,[195] the Commissioner must provide SEAs with models for evaluation of all Title I programs, including "uniform procedures and criteria" to be utilized by LEAs. The models must specify objective criteria which "shall be utilized in the evaluation of all programs and shall outline techniques . . . and methodology . . . for producing data which are comparable on a statewide and nationwide basis."[196]

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[193] Section 141(a)(6) of Title I, (20 U.S.C. 241e(a)(6)). *See* 45 C.F.R. §116.43(a)(1976).

[194] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)).

[195] Section 151(d) of Title I (20 U.S.C. 241o(d)).

[196] Section 151(f) of Title I (20 U.S.C. 241o(f)). The current regulations do not fully reflect the requirements of §151 of Title I because the process of developing Title I evaluation models has not been completed.

III. Scope of Information Provided to SEAs In LEA Applications

The regulations provide that before a LEA application can be approved, it must contain certain project information, some of which pertains to evaluation. Specifically, the regulations[197] state that a LEA application must describe "the approaches, methods, and techniques that will be used to _evaluate_ the success of the project in attaining its objectives." This description of evaluation methods must include "appropriate performance criteria and the instruments and methods to be used to measure objectively changes in the educational achievement of [participating] children." [198] The regulations also require, in part, that the LEA application describe "the resources (including the type of staff and materials) to be used in the implementation of the [Title I] projects and plans for their use,"[199] and "a budget detailing the expenditures required for the implementation of the project." [200]

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[197] 45 C.F.R. §116a.22(a)(5)(1976).

[198] 45 C.F.R. §116.43(a)(1976). As explained _supra_, the Commissioner must provide SEAs with "uniform procedures" and "objective criteria" to be used in evaluating Title I programs. This requirement is reflected in regulations which explain that the LEA's evaluation must be carried out "with regard to objective standards or norms." 45 C.F.R. §116.43(b)(1976). Furthermore, in deciding the type of measurement to be used, the LEA must consider the SEA responsibility to provide the Commissioner with reports on the effectiveness of Title I programs in the state. _Id._

[199] 45 C.F.R. §116a.22(a)(2)(1976).

[200] 45 C.F.R. §116a.22(a)(6)(1976).

In addition, the regulations indicate that each LEA application must contain "sufficient information" to enable the SEA to determine that each parent advisory council has been provided with such information as may be needed for "the effective involvement of each such council in the planning, implementation, operation, and *evaluation* of projects under Title I." The information that must be made available to parent councils includes, among other things, prior Title I evaluations.[202]

The SEA, in performing its application approval function,[203] is required to make certain determinations relating to evaluation. The SEA must determine, in part, that (1) "the evaluation plans [submitted by the LEA]...are adequate for measuring the attainment" of the educational objectives described in the application;[204] (2) the resources to be used in the project and the plans for their use are "consistent with and show reasonable promise of meeting the objectives of the project;[205] and (3) "the expenditures for the project (as set forth in the budget) are...not imprudent, extravagant, excessive, or wasteful; and [are] proposed for use solely to meet the special educational needs of [participating children]."[206]

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[201] 45 C.F.R. §116a.25(g)(3)(1976). Although the regulations do not describe the role of Title I staff in evaluation planning, former OE interpretations suggest such involvement. OE's former handbook on *Conducting On-Site Visits* asked SEAs to check whether "the teaching staff [was] involved in the development of the evaluation design," (at p. 22). OE's former *Handbook on Performance Objectives* indicated that one of the important purposes of this involvement is to ensure the formulation of realistic objectives toward which the staff will feel a sense of commitment.

[202] *Id.* *See* 45 C.F.R. §116.45(1976).

[203] *See* Chapter on Application Approval, pp. 251 - 253.

[204] 45 C.F.R. §116a.22(b)(3)(1976).

[205] 45 C.F.R. §116a.22(b)(2)(1976).

[206] 45 C.F.R. §116a.22(b)(4), (ii), (iii)(1976).

Thus, the Title I regulations state that application approval will be contingent, in part, on the submission of certain information pertaining to evaluation of Title I programs. This implies that the use of Title I funds for the evaluation of Title I programs and projects will be considered a legitimate expenditure.

IV. The Relationship of Evaluation to Program Design

Evaluation and program design (see chapter 6) are directly linked. The Title I evaluation determines the extent to which performance objectives established by the program design process have been attained and analyzes project activities and services to determine whether they are effective means of accomplishing performance objectives.

The regulations[207] require that the description of the project in the application include the "approaches, methods, and techniques that will be used to evaluate the success of the project in attaining its objectives." This indicates that evaluation considerations are an integral part of program design considerations, i.e., LEAs must establish educational objectives that are capable of being evaluated.

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[207] 45 C.F.R. §116a.22(a)(5)(1976).

The design of Title I projects is based, in part, on past Title I evaluations. Needs assessment, program design, and evaluation form a continuing feedback cycle which leads to the improvement of Title I programs. This means that Title I evaluations must be used in the program design process.

The regulations[208] provide that past evaluations are to be taken into account in the needs assessment. The comments to the regulations[209] indicate that since these evaluations are to be taken into account, they are, therefore, "a part of the project design."

V. Evaluation of Private School Participants

The regulations require that the LEA evaluation plan include those Title I participants who are enrolled in private schools. Specifically, the provision[210] states that the "evaluation of programs and projects shall, consistent with the nature and extent of participation of children enrolled in private schools, be extended to such participation." The comments preceding the regulations indicate that the responsibility for insuring that such an evaluation occurs lies with the applicant agency.[211]

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[208] 45 C.F.R. §116a.21(a)(1976).

[209] OE further explained in the comments that "[T]hese evaluations may also be used in determining the appropriate size, scope, and quality of the project, but it is left to the discretion of [LEAs] and [SEAs] as to whether it is actually to be used in the manner suggested." Comment 3 to §116a.22, 41 FR 42899 (September 28, 1976).

[210] 45 C.F.R. §116.43(c)(1976). See also pages 244-245 of chapter 17.

[211] Comment to §116.43, 41 FR 42896 (September 28, 1976).

Chapter 9

COORDINATION

Chapter 9

COORDINATION

I. Introduction

The original Title I statute (P.L. 89-10) contained a provision requiring the coordination of Title I programs with Community Action Programs funded under Title II of the Economic Opportunity Act of 1964. Although the Title I statute, as amended, no longer contains a coordination requirement, the regulations issued by OE provide for the coordination of Title I programs with other programs under specified circumstances.

The coordination requirement included in the regulations at 45 C.F.R. §116.41(1976) is divided into three sections. The fi section states that an LEA, in designing a Title I program, must demonstrate that it has taken into consideration resources available from other sources and has considered suggestions and offers of assistance made by other agencies.

The second section of the regulations pertaining to coordination explains (a) the circumstances under which LEAs may simultaneously use Title I funds and funds from other federal sources for specific components of a single project and (b) the requirement that LEAs maintain separate accounts for each funding source. (Commingling of funds is prohibited.)

The third section of the coordination regulations concerns the relationship between Title I and SCE programs. This section provides that to the extent SCE funds are "*designated and available*" for a particular service, these SCE funds *must* be used rather than Title I funds. Set forth below is a description of these requirements.

II. Consideration of Resources and Offers of Assistance From Other Agencies

LEAs are "expected to avoid using Title I funds for services that could be supplied by another agency."[212]

Consistent with this general statement of policy the LEA, in its application, must "demonstrate" that it (1) has considered "benefits which are or may be available through other public and private agencies and which would contribute toward meeting the special educational needs of educationally deprived children" and (2) has considered timely "suggestions and offers of assistance" by such agencies which may aid in "carrying out or making more effective the program or project for which application is made." [213]

To insure that this coordination in the development of the application occurs, LEAs must, upon request, make their applications "available to interested public and private agencies far enough in advance of final formulation to enable such agencies to make meaningful suggestions and offers." [214]

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[212] Comment to §116.41, 41 FR 42896 (September 28, 1976).

[213] 45 C.F.R. §116.41(a)(1976). It is indicated in the Comments to the revised regulations that "there is no basis in the statute for a regulation requiring a specific type of agency to be involved in the coordination and review process." Comment to §116.41, 41 FR 42896 (September 28, 1976).

[214] *Id.*

III. Simultaneous Use of Title I and Funds From Other Federal Programs and the Prohibition Against Commingling

The simultaneous use of Title I funds and other federal funds is authorized "to support discrete portions of a particular project."[215] However, three conditions are imposed on such simultaneous use. First, when considered separately, the requirements of both Title I and the other federal program must be met with respect to "the portion of the project which is being financed from such program."[216] Second, separate accounts must be kept for each source of federal funds, i.e., funds derived from one appropriation must not be commingled with funds derived from another appropriation.[217] Third, funds derived from an appropriation may not be transferred for use in an activity not authorized by the law authorizing that appropriation.[218]

IV. Use of State and Local Funds Designated And Available For Services Included In The Project

With respect to the use of state and local funds, the regulations require that a Title I program or project" be funded from State and local funds to the extent that such funds are specifically designated and available at the time of application for particular services included in the project." [219] Such funds must not be commingled with Title I funds.[220] The

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[215] 45 C.F.R. §116.41(b)(1976).

[216] 45 C.F.R. §116.41(b)(1)(1976).

[217] 45 C.F.R. §116.41(b)(2)(1976).

[218] 45.C.F.R. §116.41(b)(3)(1976).

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[219] 45 C.F.R. §116.41(c)(1976). The relevant comment states that §116.41(c) "emphasizes that funds currently available through State and local categorical programs which are appropriate for funding components of the Title I programs must be utilized, rather than Title I funds." Comment to 12 to ther changes in Part 116, 41 FR 42897 (September 28, 1976).

[220] *See* Section 141(a)(7) of Title I and §434(a) of GEPA (20 U.S.C. 1232c) and 45 C.F.R. §100b.477(1976) which have the effect of prohibiting Title I funds from being commingled with state and local funds. It is clear that the commingling prohibition does not preclude the simultaneous use of Title I and state funds. A recent decision of the Title I Audit Hearing Board considered whether the coordination requirement set forth in the old regulations (45 C.F.R. §116.24(c)) should be construed to preclude the simultaneous use of Title I and state funds. This provision prohibited commingling of Title I funds with funds from "other [federal and state] programs" and authorized the simultaneous use of such funds to "finance identifiable portions of a single project." In the case before the Hearing Board, a SEA had interpreted the *commingling prohibition* as precluding the simultaneous use of Title I and state funds. As a result, certain LEAs used Title I funds to provide special educational services which could have been at least partially funded by available state funds. OE's Brief before the Audit Hearing Board which rejected the SEA's interpretation stated:

> In order for Title I funds to be properly administered and accounted for, the Commissioner promulgated a provision in Section 116.24(c) of the regulations (45 C.F.R. §116.24(d)) which prohibits the commingling of Title I funds with funds under any other program. As described in *program guide* #24 commingling is a concept which prevents program funds from two sources from being drawn upon indiscriminately and is designed to insure that Title I monies only be used in projects which meet all the requirements of the Title. It is essential to the proper administration and accountability of Federal programs. Nothing in the pro-

regulations [221] also provide that Title I funds may be used, in accordance with §116.41, "to provide those services not provided by funds from other sources."

(footnote continued from previous page)

> hibition against commingling would limit a State's applying for State and local funds which could be used for purposes similar to Title I. To the contrary, the regulation clearly states that the simultaneous use of funds from Title I and other programs is permitted, as long as the accounting for such funds is separate and not commingled.

This conclusion was affirmed in the initial decision of the Title I Audit Hearing Board, Docket No. 8-(10)-74, October 16, 1975.

[221] 45 C.F.R. §116.41(c)(1976).

Chapter 10

PARENT INVOLVEMENT

Chapter 10

PARENT INVOLVEMENT

I. Introduction and Overview

Section 427 of the General Education Provisions Act authorizes the Commissioner to promulgate regulations pertaining to parent involvement in the case of any federal education program, such as Title I, in which he/she determines that "parental participation at the State or local level would increase the effectiveness of the program in achieving its purposes."

In accordance with this general authority, the Commissioner in 1971 issued Title I regulations which set forth certain minimum LEA requirements pertaining to parent involvement, including the requirement that each LEA establish a districtwide Parent Advisory Council (PAC). These regulations appeared in §116.17(o)(1974).

In 1974, Congress amended Title I by adding certain explicit parent involvement requirements, including the establishment of school-level PACs in addition to a districtwide PAC. The revised regulations incorporate the 1974 Education Amendments relating to parent involvement.

This chapter describes the major components of the parent involvement provisions, including:

- o Purpose of the Requirement
- o Membership
- o Organization

- PAC Responsibilities
- PAC Training
- Access to Information
- Budgets (Allowable Expenditures)
- Complaint Procedures
- SEA Rulemaking

II. Purpose of the Requirement

Since 1966, parent involvement has been considered a necessary component of a successful Title I program. An early OE handbook entitled, "Special Programs for Educationally Deprived Children" (OE-35079) explained, "projects for educationally deprived children will have a greater chance of success if parents are involved to a far greater extent than they had been in the past." Program Guide No. 36, issued in 1967, required that each agency include "appropriate activities or services in which parents will be involved."

Program Guide No. 44, issued in 1968 reiterated the principle that parents should participate in the Title I program.

> The applicant should demonstrate that adequate provision has been made in the Title I program for the participation of and special services for the parents of children involved in the programs. The employment of parents in the Title I projects is but one way to implement this provision. The primary goal of such activities and services should be to build the capabilities of the parents to work with the school in a way which supports their children's well-being, growth, and development.

Both the old [222] and revised [223] regulations specify that parental involvement is considered an "important means of increasing the effectiveness of programs under Title I."[224]

III. PAC Membership Requirements

A. General Membership Requirements

The Title I statute and regulations[225] generally require that school districts receiving Title I grants must establish School Advisory Councils (SACs) for each school served by a Title I program or project as well as a District Advisory Council (DAC) for the entire school district. However, under certain circumstances, the regulations provide that the DAC may also serve as the SAC. Specifically, the regulations[226/] provide that with prior approval by the SEA, the DAC may also serve as the SAC where a school district (a) has less than 1000 students enrolled in its project area schools and the DAC consists of at least one member representative from each project area school, or (b) has only one project area school.

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[222] 45 C.F.R. §116.17(o)(1)(1974).

[223] 45 C.F.R. §116a.25(a)(1976).

[224] The House Committee on Education and Labor Report No. 93-805, accompanying the Education Amendments of 1974 reports that "the National Advisory Council on the Education of Disadvantaged Children has stated: 'In any compensatory education program, just as in all educational programs, local initiative, local control, and accountability to parents and children (the clients of the education program) is imperative.' The Committee agrees with that statement and has therefore amended Title I to require the establishment of a parental advisory council for each public school participating in a Title I program. We believe that when parents are involved in the planning and implementation of a program for their children, there is greater interest on the part of both parents and children in working toward the success of that program." (emphasis added) H.R. Rept. No. 93-805, 93rd Cong. 2d Sess.3., reprinted in [1974] U.S. Code Cong. and Adm. News 4109.

[225] Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14)); 45 C.F.R. §116a.25(a)(1976).

In addition, the Title I regulations[227/] provide that a school district *may*, at its discretion, establish "*intermediate councils*" for groups of schools. For example, an LEA might form intermediate councils for K-6 schools and 7-12 schools.

B. Parents Must Constitute A Majority Of The PAC

The Title I statute[228/] requires that each advisory council have "*as a majority of its members parents of the children eligible to be served*." The regulations[229/] require that the SACs and DAC have as a majority of their members

- parents of children (including parents of private school children) who are currently participating in the program *or*
- parents of children who will participate in the projects proposed for the following fiscal year, if satisfactory data is available to identify such children.

[226/] 45 C.F.R. §116a.25(f)(1976).

[227/] 45 C.F.R. §116a.25(a)(1976).

[223 /] Section 141(a)(14)(A) of Title I (20 U.S.C. 241e(a)(14)(A).

[229/] 45 C.F.R. §116a.25(a)(1)(1976. The restriction in the old regulations [§116.17(o)(2)(1974)] that parents employed by the LEA could not be counted toward the required parent majority has been deleted from the revised regulations. The comments indicate that the LEA may, at its discretion, reinstitute the limitation locally. Comment 9 to §116a.25, 41 FR 42900 (September 28, 1976).

C. Residency Requirement

The revised Title I regulations [230] add a new membership requirement which specifies that members of the DAC must be residents of the school district and members of the SAC must reside in the attendance area of the school.

D. PAC Selection Procedures

1. Members selected by parents

The Title I statute [231] expressly provides that all members of the DACs and SACs are to be "selected by the parents in each school attendance area." The revised regulations [232] provide, with respect to the DAC and the intermediary PAC, that it be composed of members selected by the parents in the Title I project areas and, with respect to SACs, that it be composed of members selected by the parents in the school attendance area.

The regulations [233] clearly provide that participation in the selection of advisory council members is open to "all of the parents of children eligible to attend a public school serving a project area." The regulations explain that parents of children living in a project area, whose children are enrolled in private schools, are also eligible to participate in the selection process

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[230] 45 C.F.R. §116a.25(d)(1976).

[231] Section 141(a)(14)(B) of Title I (20 U.S.C. 241e(a)(14)(B)).

[232] 45 C.F.R. §116a.25(a)(2)(1976).

[233] 45 C.F.R. §116a.25(b)(1976).

In addition the regulations at §§116a.25(b), (c) and (d) set out additional requirements relating to the selection of advisory council members. These provisions are discussed below.

2. Identification of Parents Eligible For Advisory Council Membership

The "Buckley Amendments" to the General Educations Provisions Act[234] (also known as the Family Educational Rights and Privacy Act) prohibit the dispersal of federal funds to any educational agency or institution which has a a "policy of permitting the release of [students' educational] records" or other personal information without the written consent of their parents. As explained above, the Title I statute requires that a majority of members of the parent advisory committees consist of parents of *educationally deprived children to be served*. Because the identification of parents of educationally deprived children necessarily involves the identification of those children themselves, the PAC selection procedure reveals personal information about students. Therefore, the identification of parents of educationally deprived children falls within the privacy constraints of the Buckley Amendments, i.e., it requires parental consent.

Under current federal privacy regulations, the identification of parents for PAC selection would proceed as follows:

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[234] Section 438(b)(1) of GEPA (20 U.S.C. 1232g(b)(1)), as amended by §513(a) of P.L. 93-380.

First, each educational agency or institution must adopt a policy of recordkeeping and disclosure consistent with the requirements of the act.[235] Under the Amendments, "school officials" are exempt from obtaining the prior consent of parents when in the pursuit of "legitimate educational interests." Thus, each educational agency or institution must also define the criteria used in determining who are "school officials" and what are "legitimate educational interests."

Since school officials responsible for PAC coordination are presumably "school officials" for purposes of the Buckley Amendments, and further, since PAC selection is presumably a "legitimate educational interest," such officials would have access to lists of eligible children without prior parental consent.

Second, current privacy regulations[236] also authorize disclosure of student information to the students' parents(s) without prior consent. However, it would not be permissible to disclose this student information to other members of the community.

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[235] 45 C.F.R. §99.5 (1976).

[236] 45 C.F.R. §99.30(a)(2)(1976).

Therefore, in order to identify parents of eligible children for PAC selection, their written consent is required.[237] Minimally, the written consent must include:

> 1. A specification of the records to be disclosed,
>
> 2. The purpose or purposes of their disclosure, and
>
> 3. The party or class of parties to whom the disclosure may be made. [238]

Finally, in response to the framework described above, Title I regulations[239] contain the following directives which focus on PAC selection:

> In consultation with the district advisory council, the local educational agency shall establish appropriate procedures whereby parents of children who are currently participating or who will be participating in the proposed project [can] be identified so that they may be considered for membership on a school, intermediate or district advisory council. In no case may parents be identified, for the purposes of this subsection, unless they have first given their consent to be so identified. [emphasis added]

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[237] 45 C.F.R. §99.30(a)(1)(1976).

[238] 45 C.F.R. §99.30(c)(1976).

[239] 45 C.F.R. §116a.25(c)(1976).

Thus, the district PAC and LEA are jointly responsible for developing specific procedures for PAC selection, provided those procedures are consistent with the general federal requirements. For example, standardized consent forms might be developed, and a mail or telephone campaign initiated for purposes of contacting parents.

Essentially, the Buckley Amendments will create a pre-selection process, since those parents who do not wish to become PAC members are likely to withhold their consent.

3. Procedures for Selection

The revised regulations [240] require LEAs to establish, after consultation with the DAC, "appropriate procedures for the nomination and selection" of advisory council members. The comments [241] indicate that OE intended the regulation to

> ...conform with the specific requirements of the statute and to provide maximum flexibility for the State and local educational agencies to encourage parent involvement. The method of selection, therefore, is left to the discretion of the local educational agency (in consultation with the district advisory council) as to what it deems to be the most effective method of encouraging parent involvement, as long as such methods do not preclude or discourage participation by all parents in a project area in the selection of council members (emphasis added).

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[240] 45 C.F.R. §116a.25(d)(1976).

[241] Comment 14 to §116a.25, 41 FR 42901 (September 28, 1976).

The regulations[242] do, however, specifically require LEAs to include in their procedures a provision for

> affording timely and adequate notice to parents and the general public in the [LEA's]school district (or in the appropriate school attendance area in the case of a school council) of the time, place, and method whereby such selection [will be made]. [emphasis added]

The section continues:

> The [LEA] shall take appropriate measures, such as the publication of the notice in a language other than English, to insure that adequate notice is provided for parents in an area where the dominant language is other than English.

Finally, the section requires LEAs to make available to the public, through appropriate notices, the names of all members of the advisory councils and to continue to make them available upon request.

4. Membership of Districtwide or Intermediate Councils

The regulations[243] provide that the LEA may require that the districtwide or intermediate advisory councils be composed "solely" of SAC members, "each member of which is elected by his or her school council."

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[242] 45 C.F.R. §116a.25(d)(1976). The comments indicate that this regulation is viewed as giving LEAs flexibility "in determining the appropriate form of notice." The use of local media and newspaper announcements would generally satisfy the notice requirement. Comment 17 to §116a.25, 41 FR 42901 (September 28, 1976).

[243] 45 C.F.R. §116a.25(e)(1976).

IV. PAC Organization and Coordination

The Title I statute does not contain any specific guidance concerning organization procedures PACs must follow. However, the regulations 244/ require that the LEA demonstrate in its application that each DAC, each intermediate council, and each SAC

> ...operates under procedures which are adequate to insure timely and proper performance of its functions, including procedures for convening meetings, and for the recording and maintenance of minutes. (emphasis added).

The regulations 245/ also provide that SACs must devise "procedures for coordinating its functions and its recommendations to the [LEA] with those of other councils in the district."

V. PAC Responsibilities

A. Overview of PAC Responsibilities

The Title I statute, 246/ as amended by the 1974 Education Amendments, requires LEAs to give its advisory councils "responsibility...for advising it in the planning for, and the implementation and evaluation of" its Title I programs and projects.

244/ 45 C.F.R. §116a.25(a)(5)(1976).

245/ 45 C.F.R. §116a.25(a)(6)(1976).

246/ Section 141(a)(14)(C) of Title I (20 U.S.C. 241e(a)(14)(C))

In implementing the statutory requirement, the revised regulations[247] use language almost identical to the statute. In addition, §116a.25(g)(1976) of the revised regulations entitled "Involvement of Councils" requires LEAs to include sufficient information in their application to enable the SEA to make "determinations set out in the subsection.[248]

These "determinations" address, among other things, the following areas:

- involvement of parents in the needs assessment and program design decisions; and
- parental comment on the LEA application.

Set forth below is a more detailed description of the parent involvement with respect to the areas described above.

B. Parental Involvement In Needs Assessment and Program Design

The regulations[249] require an LEA to include sufficient information in its application so that the SEA can determine

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[247] 45 C.F.R. §116a.25(a)(3)(1976). In response to questions raised by several commenters, OE, in the preamble explained, "in accordance with Section 141(a)(14)(C), the councils have only an advisory function; they do not have the power to prevent the submission of an application by refusing to "sign-off." However...the [LEA] must insure that it has the advice of its councils on the application and on major decisions affecting the operation of such programs and projects." Comment 5 to §116a.25, 41 FR 42900 (September 28, 1976).

[248] The comments indicate that §116a.26(g) "gives guidance as to the type of activities in which [PACs] are to be engaged, consistent with [the statute]." It is further stated that the SEA could, at its discretion, utilize its specific PAC rulemaking powers (discussed *infra.*) to issue additional rules and procedures (consistent with the revised regulations) defining the scope of PAC involvement to ensure proper functioning of the PACs. Comment 3 to §116a.25, 41 FR 42900 (September 28, 1976).

[249] 45 C.F.R. §116a.25(g)(4)(1976).

> That each council has had an adequate opportunity to consider the information available concerning the special educational needs of the educational deprived children residing in the project area (or areas), and the various programs available to meet those needs, and to make recommendations concerning those needs which should be addressed through the Title I program and similar programs.[emphasis added]

In addition to the parent involvement section in the revised regulations (§116a.25), other sections in the regulations emphasize the need for parental involvement in the Title I program. Under §116a.21(g) (needs assessment) the LEA is required, to the extent feasible, to consult with parents when making the determinations required in the needs assessment process. Moreover, the section of the regulations concerning "project description"[250] requires that the SEA determine from the LEA application that the Title I program in each project area includes

> specific provisions for informing and consulting with parents concerning the services to be provided for their children under Title I...and the ways [they] can assist their children in realizing the benefits those services are intended to provide.[emphasis added]

Finally, the revised regulations,[251] in accordance with Section 141(b) of Title I, encourage the development of individualized educational plans and require that such plans be "agreed upon jointly by the [LEA], a parent or guardian of the child, and when appropriate, the child."

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[250] 45 C.F.R. §116a.22(a)(8)(1976).

[251] 45 C.F.R. §116.47(1976).

C. *Parent Review of the Proposed Application*

The Title I regulations[252] include a multi-tiered system for considering parental input with respect to the Title I application. First, the LEA must demonstrate in its Title I application that "all *parents of children to be served* have had an opportunity to present their views concerning the application *to the appropriate school council*."

Once the "appropriate school council" has received the views of the parents, it must be shown that each council "has had an opportunity to submit its comments to the local educational agency."[253]

Finally, the *LEA* must demonstrate that it has considered "such comments in determining whether or not the application shall be approved and submitted to the State educational agency."[254]

VI. *PAC Training Requirements*

The revised regulations[255] contain a new provision requiring all school districts to provide "*all council members*" with

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[252] 45 C.F.R. §116a.25(g)(5)(1976).

[253] *Id.*

[254] *Id.*

[255] 45 C.F.R. §116a.25(g)(2)(1976). OE's policy concerning PAC training formerly appeared in Program Directive L210-2, February 27, 1976. The introductory paragraph explained "Title I, as amended by P.L. 93-380, requires in Section 141(a)(14)(C) that each local educational agency give its district and school advisory councils'...responsibility...for advising it in the planning for, and the implementation and evaluation of, such programs and projects..'. *Such councils, therefore, must not only be properly constituted but also adequately prepared to perform their advisory functions*." (emphasis added)

"appropriate training materials and orientation which will assist them in carrying out their functions." Information tion concerning the type of training which will be provided must be included in the school district's application.[256]

In addition, the regulations[257] pertaining to pre-service and inservice training provide that parent council members who are "engaged to perform specific services related to approved programs or projects" may receive training paid for with Title I funds.

VII. Access to Information Concerning Title I Programs

A. Overview

As explained supra, the Title I statute requires that PACs must be involved in the planning, implementation and evaluation of Title I programs and projects. To ensure that parent involvement is meaningful, the Title I statute and the implementing regulations[258] also require that PACs be provided with "access to appropriate information concerning such programs and projects." The Title I statute and regulations[259] also include access to information requirements applicable to parents and the general public. The implementing regulations[260] require that the LEA include in its application "specific plans" for disseminating information "concerning the provisions of Title I and the applicant and present Title I programs," including, among other things

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[256] Id.

[257] 45 C.F.R. §116.36(b)(1976).

[258] Section 141(a)(14)(D) of Title I (20 U.S.C. 241e(a)(14)(D); 45 C.F.R. §116a.25(a)(4)(1976).

- evaluations of Title I programs;
- all reports submitted to the SEA in accordance with applicable Title I requirements;
- comparability reports; and
- such other documents as may be reasonably necessary to meet the needs of such parents or other members of the public for information related to the comprehensive planning, implementation, and evaluation of the Title I program.

Although the scope of access is extremely broad, the regulations[261] do contain one important limitation. Parents and the general public may not have access to information "relating to the performance of identified children and teachers."

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[259] Section 141(a)(8) of Title I (20 U.S.C. 241e(a)(8)) and 45 C.F.R. §116.45(1976).

[260] 45 C.F.R. §116.45(1976). Relevant information and documentation must be retained and made available "until the expiration of five years after the completion of a Title I project" or until an HEW audit has been resolved. Id.

[261] Id.

In addition to expressly authorizing PAC access to relevant information, the regulations require that certain documents be supplied, as a matter of course, to each council member and other documents be supplied, as a matter of course, to each council. These provisions are described below.

B. Materials Provided to Each Council as a Matter of Course

The Title I regulations [262] provide that each council must be "provided" with the LEA's current application and "other information and documents...as may be needed for the effective involvement of each such council in the planning, implementation, operation, and evaluation of projects under Title I." The regulations [263] include prior applications and evaluations as illustrations of the type of information which must be provided.

C. Materials Provided to Each Council Member as a Matter of Course

In addition to specifying the information which must be provided to the DACs and SACs, the regulations [264] specify that each council member must be furnished

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[262] 45 C.F.R. §116a.25(g)(3)(1976).

[263] Id. The regulations cross reference §116.45 (the access to information requirement) to clarify OE's position that such information only has to be kept available for five years or until an HEW audit has been completed. Commen 6 to §116a.25, 41 FR 42900 (September 28, 1976).

[264] 45 C.F.R. §116a.25(g)(1)(1976).

- copies of Title I of ESEA,
- Federal regulations and guidelines, and
- State regulations and guidelines.

In addition, each council member must be provided with "appropriate training materials." [265]

D. Cost of Information Provided to PACs, Parents, and the General Public

The Title I regulations[266] require that the LEA application must include in its plan for dissemination of Title I information a "provision for the reproduction, upon request, of such documents free of charge or at reasonable costs (not to exceed the additional costs incurred which are not covered by Title I funds)." In the alternative, the regulations provide that the LEA must provide persons requesting information with an "adequate opportunity to arrange for the reproduction of such documents."

VIII. PAC Budgets (Allowable Expenditures)

The Title I regulations[267] provide that the LEA Title I application must include "a budget detailing the expenditures required for the implementation of the project."

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[265] 45 C.F.R. §116a.25(g)(2)(1976). See supra, for a more detailed discussion of the training requirement.

[266] 45 C.F.R. §116.45(1976).

[267] 45 C.F.R. §116a.22(a)(6)(1976).

The regulations imply that the LEA will have to budget some of their Title I funds for PAC organization and training (see supra.). In addition, the regulations[268] specifically provide that

> [m]embers of [PACs] and volunteers not receiving regular compensation under Title I may be reimbursed from Title I funds for personal expenses directly attributable to the performance of their duties and functions as set forth in the approved applications.

VIII. Complaint Procedures

When PACs, parents, organizations or members of the general public suspect that a school district or an individual school may be violating Title I law or regulations, including the pursuit of policies which are inconsistent with the LEA's application, they have the right to file a complaint directly with the SEA. The regulations[269] provide general guidance to states for establishing meaningful and effective complaint investigation procedures by requiring:

- o Specific time limits--normally no longer than 60 days--to investigate and resolve complaints,

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[268] 45 C.F.R. §116.33(1976). The comments to the revised regulations indicate that "in only the most limited circumstances would the compensation of a council member be allowable as necessary...". Comment 1 to §116.33, 41 FR 42896 (September 28, 1976). In a related comment, OE indicated that SEAs must decide on a case-by-case basis "that the proposed activities for [PACs] and volunteers are appropriate, likely to be effective, and are set forth in sufficient detail to determine whether the expenses incurred will be within the scope of the approved project. Guidance in general is provided in the cost principles contained in Appendix B to Part 100b [of GEPA regulations] which states that costs must be 'necessary and reasonable for proper and efficient administration of the grant program.' " Comment 2 to §116.33, 41 FR 42896 (September 28, 1976).

[269] 45 C.F.R. §116.6(1976).

- An opportunity for complaining parties to present evidence to state Title I officials, and

- Distribution of information about state complaint investigation procedures to interested parties, including PACs.

In addition, the regulations[270] require that the SEA prepare certain reports pertaining to complaints filed with it. Specifically, the SEA must file

(a) A status report with the U.S. Commissioner of Education describing every complaint which has not been fully investigated and resolved within the 60-day period along with an explanation of its current status, and

(b) A final report with the U.S. Commissioner describing fully investigated complaints which at a minimum summarizes the substance of any allegation and the name of the party or LEA filing the complaint, the results of the investigation and any hearings held on the complaint, and the final action taken on the complaint.

Copies of reports sent to the Commissioner must be sent to the local school district in question and the complaining party or parties.[271]

IX. SEA Rulemaking

The regulations[272] specifically allow SEAs to "establish such additional rules and procedures, not inconsistent with the provisions of this section, as may be reasonably necessary to insure the involvement of parents and the proper organization and functioning of [PACs]."

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[270] 45 C.F.R. §116.7(b)(1)(2)(1976).

[271] 45 C.F.R. §116.7(b)(3)(1976).

[272] 45 C.F.R. §116a.25(h)(1976).

Chapter 11

THE SUPPLEMENT, NOT SUPPLANT AND EXCESS COSTS PROVISIONS

Chapter 11

THE SUPPLEMENT, NOT SUPPLANT AND EXCESS COSTS PROVISIONS

I. Introduction

In the previous chapters, we explained that the Title I legal framework prescribes which children will receive benefits under Title I. The Title I statute focuses additional resources on meeting the needs of educationally deprived children residing in areas having high concentrations of children from low-income families. In other words, only certain children (educationally deprived children) residing in certain areas (areas having high concentrations of children from low-income families) are eligible for Title I assistance. This basic focus of Title I is explained in the Congressional Declaration of Policy:

> In recognition of the special educational needs of children of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children. [Emphasis added.] 273/

273/ Section 101 of Title I (20 U.S.C. 241a).

The basic purpose of the supplement, not supplant, and excess costs provisions is to ensure that Title I funds are used to meet the "special" unmet educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families and to "expand and improve" their educational programs.

Essentially, the supplement, not supplant and excess costs provisions prohibit LEA discrimination against children participating in Title I programs in the provision of state and local funds, where the discrimination is attributable to the fact that those children receive special assistance under Title I. Under the supplement, not supplant provision , children participating in Title I programs must receive their fair share of state and local funds. The excess costs provision is simply an extension or clarification of the supplement, not supplant provision. Title I funds are to be used to pay for the supplementary components of programs. Phrased differently, Title I funds can only be used to pay for the excess costs or supplementary aspects of a program.

In sum, these provisions are intended to ensure that children in project areas actually participating in programs funded under Title I are not discriminated against inthe application of state and local funds because of the existence of Title I. These provisions do not prohibit the rendering of any particular service to educationally deprived children or the pursuit of any particular instructional strategy; they simply explain the funding source which must be employed, Title I versus state and local.

This chapter explains these essential principles. It discusses not only the statutory and regulatory provisions establishing them, but also several OE interpretations of these principles set forth in correspondence with SEAs.

II. The Standards and Restrictions Contained in the Title I Statute and Regulations

A. The Language Set Forth in the Statute

The supplement, not supplant provision set forth in the Title I statute generally provides that Title I funds must be used to supplement, not supplant the level of state and local funds that would be made available for the education of children participating in Title I programs, but for the existence of Title I.[274] The specific language contained in the statute is set forth below.

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[274] Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B)). See also Section 434(b)(1)(A)(iv) of GEPA (20 U.S.C. 1232c(b)(1)(A)(iv)) which generally provides that the state must follow "such policies and use such methods and practices of administration as will insure that non-Federal funds will not be supplanted by Federal funds."
The "supplement, not supplant" provision was added to the Title I statute in 1970, even though the basic structure [footnote continues]

> Federal funds made available under this title will be so used (i) as to supplement and, to the extent practical, increase the level of funds that *would, in the absence of such Federal funds, be made available from non-Federal sources* for the education of *pupils participating in programs* and *projects* assisted under this title, and (ii) in no case, as to supplant such funds from non-Federal sources. [Emphasis added.]

The excess cost provision[275] states that "payment under this title will be used for the *excess costs* of programs and projects . . . ." The term is defined to mean

> those costs directly attributable to programs and projects which exceed the average per pupil expenditure of a local educational agency in the most recent year for which satisfactory data are available for pupils in the grade

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[footnote continued from preceding page] of Title I has always required that Title I funds must supplement and never supplant state and local funds. The Senate Committee Report accompanying the amendments adding the supplanting provision explained, "under present law there is no specific prohibition against supplanting State and local funds with Federal funds *even though* supplanting would be inconsistent with the theory of Title I. Title I funds are intended to be supplementary to the education program generally offered by the States and local educational agencies." S. Rep. No. 91-634, 91st Cong., 2d Sess., reprinted in (1970) *U.S. Code Cong. and Adm. News* 2781.

[275] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)). The excess costs concept has been included in the federal legal framework since 1968. (See Section 4.1 of *Program Guide No. 44*). The provision was added to the Title I statute by the 1974 amendments to further clarify the supplementary nature of Title I. H.R. Rep. No. 93-805, 93d Cong., 2d Sess., reprinted in (1974) *U.S. Code Cong. and Adm. News* 4108.

or grades included in such
programs or projects 276/

B. The Language Set Forth in the Regulations

The key phrases included in the supplement, not supplant regulations[277] are that the use of grant funds may not result in a "decrease" in the level of state and local funds (for educationally deprived children) "which, in the absence of funds under Title I, would be made available" and educationally deprived children residing in low-income areas may not otherwise be "penalized" in the application of state and local funds because of the use of Title I funds.

Furthermore, the regulations provide that in no case may Title I supplant, i.e., replace the level of state and local funds that would have been made available but for the existence of Title I. Specifically, the operative language

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276 / Section 403(17) of P.L. 81-874. The definition excludes state or local programs for educationally deprived children, or expenditures for bilingual or special education programs for handicapped children.

277 / OE policy pertaining to the concept that Title I funds must supplement, not supplant state and local funds has appeared in the following program guides, now superseded: Program Guide No. 44, Sections 4.1 and 7.1 (March 18, 1968), Program Guide No. 45 (June 14, 1968), Program Guide No. 45A (July 31, 1969), and Program Guide No. 57 (February 26, 1970).

of the regulations[278] states:

> (1) Each application by an applicant agency for a grant under Title I shall contain an assurance that the use of the grant funds will not result in a decrease in the use (for educationally deprived children) of State or local funds which, in the absence of funds under Title I, would be made available for the education of such children, and that such children will not otherwise be penalized in the application of State and local funds because of such a use of funds under Title I.
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> (2) No project under Title I shall be approved unless Federal funds made available for that project (i) will be used to supplement, and to the extent practical, increase the level of State and local funds that would, in the absence of such Federal funds, be made available for the education of pupils participating in that project; (ii) will not be used to supplant State and local funds available for the education of such pupils.

In addition to prescribing standards and restrictions concerning the supplement, not supplant provision, the regulations reiterate the statutory directive that Title I funds pay only for the excess costs of programs assisted under Title I.[279]

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[278] 45 C.F.R.. §116.40(a)(1), (a)(2)(i), and (a)(2)(ii)(1976).

C. Applying the Standards and Restrictions Set Forth in the Statute and Regulations to Commonly Occurring Situations

1. Tests Contained in the Regulations

As explained above, §116.40(a) contains the relevant standards and restrictions concerning the supplement, not supplant and excess costs provisions. The regulations also explain how these standards and restrictions are to be applied under several commonly occurring factual situations.

First, §116.40(b) explains how to apply these standards where an LEA is considering the use of Title I funds to pay for a service which it must otherwise provide pursuant to state law or pursuant to a court decree. In general, this paragraph provides that services which an LEA must provide pursuant to state law or by court decree be paid for with state and local and not Title I funds.

Specifically, the paragraph provides:

> Title I funds shall not be used to provide services which the applicant agency is required to provide by State law or pursuant to a formal determination under Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 (Pub. L. 92-318), or section 504 of the Vocational Rehabilitation Act of 1973, as amended, or pursuant to a final order of a court.

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[279] 45 C.F.R. §116.40(a)(2)(iii)(1976).

In the comments to the revised regulations, OE explained that:

> The prohibition in this paragraph, which is an application of the "supplement, not supplant" concept, *presumes* that where the applicant is required by statute or court order to provide certain services, such services would be provided in the absence of Title I funds. [280]

OE then explained the circumstances under which Title I funds may be used:

> If a program mandated by State or Federal law receives sufficient State and local funding to meet the requirements of the appropriate law, then Title I money can be used to supplement the services available from such funding. [281]

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[280] See Comment 3 to §116.40, 41 FR 42896 (September 28, 1976). Since 1969, several of the tests used by OE for determining compliance with the principles described in the text rely on "indicators" or "presumptions"(see Program Guide No. 45A issued on July31,1969 and recent correspondence with SEAs).The process works as follows. First,OE specifies the type of policy or practice which, if discovered by monitors or auditors,would *indicate* that a violation had occurred.In other words, *OE must first* establish what is commonly referred to as a "prima facie" case. The *burden of proof* then shifts to the state or LEA to *rebut* the presumption.Presumptions shifting the burden of proof are not unique to Title I. As explained in a recent case decided by the United States Supreme Court involving Title VII of the Civil Rights Act of 1964 (employment discrimination), presumptions shifting the burden of proof are often created to (1) reflect judicial evaluations of probabilities and (2)conform with a party's superior access to proof. *International Brotherhood of Teamsters v. United States* ___U.S.___, Slip Opinion at p.33n.45 (May 31,1977)

[281] *Id.*

The revised regulations also explain how to apply the supplement, not supplant standard where state and local compensatory education funds are "designated and available" to pay for specific components of a compensatory education program or project.

Paragraph (c) of §116.41 (entitled "Relation of Title I Projects to Other Programs") provides that to the extent state and local funds (including State compensatory education [SCE] funds) are "designated and available" for a particular service they must be used for that service; Title I funds may only be used to provide other services or to supplement those services provided with state and local funds.

Specifically, the regulations [282] provide:

> A program or project set forth in a project application that meets all the requirements of Title I shall be funded from State and local funds to the extent that such funds are specifically designated and available at the time of application for particular services included in the project. Under the conditions set forth in this section, Title I funds may be used to provide those services not provided by funds from other sources.

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[282] 45 C.F.R. §116.41(c)(1976). The comments to the revised regulations explain that "Section 116.41(c) emphasizes that funds currently available through State and local categorical programs which are appropriate for funding components of the Title I programs must be utilized, rather than Title I funds." Comment 12 to other changes in Part 116, 41 FR 42897 (September 28, 1976). The relationship between Title I requirements and SCE programs is more fully described *infra*, pages 186 - 196 .

2. Tests Contained In Old Guidelines and OE Correspondence

a. Introduction -- Prior to the publication of the revised regulations in the Federal Register, OE explained in correspondence with SEAs how the old supplement, not supplant regulations (which were virtually identical to the revised regulations) were to be applied under additional circumstances often encountered by LEAs designing Title I programs. Set forth below is a summary of OE policy concerning the application of the supplement, not supplant and excess costs provisions to such issues as: the curtailment of services previously provided with state and local funds, the cancellation of funds previously committed, "how to" design a legal, non-supplantive pull-out program,[283] how to design a legal non-supplantive in-class program, the circumstances under which a child may receive credit for a course taught by a teacher paid for in whole or in part out of Title I funds, and the circumstances under which a teacher paid for out of Title I funds may be used for hall duty, cafeteria duty, etc.

b. Curtailment Test -- Program Guide No. 45A issued on July 31, 1969 (and now suspended) stated that "in reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of basic Title I requirements:

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[283] In a "pull-out" program a child receives his/her compensatory education program in a setting other than the regular classroom.

***(5) the applicant proposes to curtail expenditures of State and local funds for certain services and, in effect, to substitute Title I funds in order to maintain those same services in the Title I areas."

The program guide continues, explaining that such a curtailment is an indication of a violation by stating that "any applicant that insists on entering a proposal fitting the description [in 5] above must assume the burden of proof that the proposal does not involve the supplanting of State and local funds."

This standard was recently invoked in a letter from OE to one of the States included in our survey. The letter provides, in relevant part, that

> It is difficult, of course, to determine precisely the level of non-Federal funds that would be provided if Title I funds were not available. There are, however, ...basic indications of decreases in that level: (a) the withdrawal of services that have been provided at Title I schools .... The use of Title I funds to restore the services...would constitute "supplanting"

In other words, the withdrawal of a service indicates that the level of funds previously provided has been reduced by the cost of that service. However, as indicated by Program Guide No. 45A (see above), such a reduction is not conclusive proof of a violation. The LEA would have the burden of proof and could show that such a replacement has not occasioned a reduction in the level of funds or, to the extent that a reduction has occurred, it was not because of the existence of Title I funds. The application of this test is further clarified with reference to the following illustration.

Assume that in State A maintenance funds in the amount of $2,000 per teacher are made available to all school districts. The curtailment of these State and local funds for maintenance and operation by the LEA in Title I project area schools and the substitution of Title I funds would indicate that a supplanting violation has occured.

However, if the LEA could show that educationally deprived children in project area schools were to receive their fair share but the State formula had changed, occasioning a reduction for all schools, no violation would in fact have resulted. Further, it should be noted that any increased costs due to the operation of Title I programs, e.g., over time due to special Title I funded activities could be charged to Title I without resulting in a supplanting violation.

c. Funds Previously Committed Test -- A second standard for determining whether there has been a penalization or replacement of state and local funds with Title I funds covers situations where an LEA had not actually expended state and local funds in the past but has made a commitment to expend such funds.

For example, assume that the LEA had committed local funds for the construction of additional classrooms at several Title I schools. Where the school board by official action cancels encumbrances of bond funds and authorizes instead the encumbrance of Title I funds, a supplanting violation would be indicated.

d. Pull-Out and In-Class Programs -- The Title I statute and regulations offer no express standards for determining the legality of pull-out programs, other than the general directive in the regulations that children receiving benefits under Title I may not be penalized in the level of funds which would have been provided with state and local funds if Title I did not exist. However, OE has, on occasion, explained its position in correspondence with particular SEAs which interpret the relevant statutory and regulatory provisions as well as Sections 4.1 and 7.1 of the now superseded Program Guide No. 44.

There are numerous alternative instructional strategies available to LEAs. However, these alternatives fall into two general categories. The first category consists of programs wherein the LEA continues to provide to program participants the same base program provided to non-participants. Title I funds are then used, in a coordinated fashion to expand and improve the base program. On the other hand, the LEA may wish to totally restructure the program participants base program. In other words the program participant base program and Title I program become one in the same. Title I funds are used to restructure the base program.

OE policy pronouncements explain "how to" determine whether an LEA pursuing these approaches has satisfied the supplement, not supplant and excess costs provisions. For purposes of this paper, we will describe the first approach as model 1 and the second approach as model 2.

The first model is described in correspndence with SEAs. In one letter written to an SEA, OE explained that the model one pull-out program design "should be conducted in such a way as to be supplementary to and coordinated with instructional programs being provided for Title I children in their regular classroom". Under this program design model, the regular classroom teacher retains ultimate responsibility and control over the child's progress. The Title I paid teacher is responsible for meeting the child's special needs, the regular classroom teacher retains the responsibility of providing for the child's general needs.

Under the circumstances described above, it is obvious that the regular classroom from which the child was "pulled", will enjoy a reduced pupil to teacher ratio. A second letter written by OE explains that "the incidental effect of reducing class size [i.e., the size of the class from which the child is "pulled"] may be approved, provided that the instructional program is definitely tailored to meet certain special needs of targeted children. Title I funds are to be used for the expansion and improvement of the regular school program and not for the replacement or supplanting of state and local funds in support of that program."

Set forth below is an example of a LEA program design which did not expand and improve the regular program, but rather provided the child's total program of instruction. The example was contained in an OE Review Team Report.

> the method of scheduling, the class size, the similarity of the Title I program to the regular program, the inconsistencies in selection of children, and the giving of the reading grade by the Title I teacher leads the team to conclude that the Title I reading and/or math was not supplemental and was merely used to reduce class size.

In sum, if a so-called "pull-out" program contibutes to meeting the needs of the participating children (a) by providing a supplementary program, i.e., one which expands and improves the regular school program which is (b) coordinated with the regular classroom teacher, who retains ultimate responsibility and control over the child's progress, a supplanting violation has not occurred. It is presumed that the child is continuing to receive his/her fair share of state and local funds. Therefore, if these conditions are satisfied, the LEA need not contribute any of its own funds to the operation of the pull-out program. To the extent these conditions are not satisfied, the LEA will be considered to have violated the supplement, not supplant provision unless it contributes state and local funds to support that portion of the instructional program which would have been paid for from state and local funds but for the existence of Title I. The alternative of contributing state and local funds is described below. We refer to this alternative as model 2.

A second pull-out program design is also acceptable under the existing federal legal framework. Under this model the LEA may totally restructure a child's educational experience, either with respect to one curricular area or with respect to the participating child's total educational experience, by the provision of a distinct, non-coordinated program, so long as the LEA continues to contribute the level of funds that would have been provided from state and local sources but for the existence of Title I.

Since as early as 1968, OE has consistently explained that such a distinct program designed to meet the participating child's special educational needs is permissible under specified circumstances. Today this concept is explained with reference to the excess cost provision. Section 4.1 of Program Guide No. 44 provided that

> Probably the most obvious indication of a child's need for special educational assistance under Title I is his inability to respond constructively to the regular school program. In many cases this program can be modified and integrated with the services to be provided under Title I so as to provide the child with a total program adapted to his special needs. In this connection, the requirement that applicants maintain regular school programs in the project areas at the same levels as they would have been maintained if Title I funds were not available applies only to expenditures and not to the program itself.

Consistent with this program guide, OE has recently explained in correspondence with an SEA that to the extent the LEA chooses this option:

> It would be appropriate, therefore, and indeed required that State and locally funded staff be provided for any group of children in remedial classes in the same proportion as for the same number of other children.

The letter continues by including the following example:

> Thus, is one teacher with four teaching periods is normally provided for 100 children then the equivalent of one State and locally funded teacher should be provided for 100 children enrolled in remedial classes for children designated to receive assistance under Title I.... Our recommendation then... is that once a carefully designated compensatory education program in mathematics has been established [in lieu of the child-children's regular math], a normal input of State and locally funded resources should be provided commensurate with the number of children involved.

Recently a SEA asked OE whether comparability requirements would be violated if 5th grade pupils eligible for services under Title I may be taught exclusively by a Title I paid remedial math teacher. The Commissioner explained that

> If the illustration provided, such a procedure would not violate the comparability requirement, but would appear to violate the supplement, not supplant requirement of the statute. Thus, the 20 fifth graders in need of remedial mathematics are entitled to instructional services provided with state and local funds.

In short, the participating children are entitled to their fair share of state and local funds. Thus, applying this standard to the OE Review Team Report finding described supra., the mere facts that the LEA designed a pull-out program which was similar to the regular classroom program and the pull-out teacher gave the children their grades, does not mean that a per se violation of the supplement, not supplant provision has occured. The critical question is whether the LEA expended on the children participating in the pull-out program in the amount of state and local money normally accruing to these children? In the situation described supra, the LEA did not contribute the amount normally accruing.

In addition to explaining the two non-supplantive pull-out program design options which LEAs may pursue, OE has applied the supplement, not supplant provisions to the following situations: the educationally deprived child is "pulled-out" of his/her regular class for (a) one-half day[284] or for a full day.[285]

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[284] In the spring of 1975, an SEA presented the following question to OE. "Would the U.S. Office of Education be in agreement with a plan where children receiving Title I services could be removed from the state-supported school program for no more than one-half the legal school day and such practice would keep the LEA in compliance with the Federal Law and Regulations?"

OE explained that a program in which a child is pulled-out of his/her class for less than one-half day will be considered legal if (a) there is coordination between the Title I paid teacher and the regular classroom teacher and (b) the latter retains control over the child's educational progress in that subject area. This is consistent with the policy governing Type #1 programs. (see *supra*)

If a program is for one-half day or greater, OE said that sufficient coordination and control is not possible and therefore "a consideration of the excess cost concept . . . has led us . . . to the conclusion that State and locally funded staff and related instructional services should be provided for such a program. The number of State and locally funded staff provided for a full one-half day [or longer] Title I program...should be commensurate with the number of children involved . . . ." This is consistent with the policy governing a Type No. 2 program design. (see *supra*).

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[285] In 1974 OE developed criteria for determining whether a full day pull-out program is illegally supplantive. This OE policy was not set forth in federal regulations or guidelines but appeared in letters written to at least two states. Set forth below are the standards contained in the OE letters as well as state interpretations of these standards.

(a) All requirements concerning comparability have been met.

(b) Programs are substantially different in quality and content from services offered children in regular classrooms and are designed to meet specific needs of the children to be served.

(c) As noted above, personnel and all other resources provided children enrolled in regular classrooms are also provided to children who are participating in a Title I program. If, for example, a classroom teacher is assigned to 25 pupils in a regular school program, a similar ratio should exist for children participating in a Title I program. It is only after the basic educational services have been provided with State and local funds uniformly throughout the school district that supplementary services funded under Title I should be provided to eligible children.

(d) Any negative effects of the temporary isolation of the children in the pull-out classes must be outweighed by the positive effects that have been shown as the result of participation in the program.

Furthermore, letters state OE's policy with respect to the timing of the pull-out program.[286] Finally, OE explained the circumstances under which an in-class program using teacher aides would be non-supplantive.[287]

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[286] "It is our intention not to limit unduly the options of local educational agencies with respect to the timing and the approaches to be taken in the development of special Title I instructional activities to be conducted outside the regular classroom. We would suggest therefore, that your office avoid recommending that students be '. . . served in a resources room during their regular mathematics, language arts, or reading instructional period.' The timing of Title I pull-out programs should be based on educational considerations as well as the practical constraints on the local school system."

[287] The OE letter explains that an aide paid for totally with Title I funds may be used "in order to free the teacher to perform Title I functions" the letter then adds: "However, it is important to note that the mere assignment of a teacher aide to a regular classroom teacher does *not* constitute a Title I program. The teacher aide must be a part of a more comprehensive program particularly designed to meet the special educational needs of educationally deprived children."

Further, OE explains the role and responsibility of the regular classroom teacher. "Any supervising teacher assigned a Title I aide must know and be accountable for the contribution the aide is supposed to make to the realization of the objectives of the Title I program." The in-class program design must also comply with the general aid prohibitions. The relevant standards concerning the general aid provision are described *infra*.

e. Receiving Credit for Remedial Courses and Duties Performed by Teachers Paid For Out of Title I Funds -- Finally, OE letters explained when a child may receive credit for a course taught by a teacher paid for with Title I funds,[288] and whether a teacher paid for with Title I funds may be used for hall duty, cafeteria duty, etc.[289]

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[288] OE maintains that the relevant issue is not credit v. no-credit but whether or not the LEA is providing a Type #2 program design (see *supra*): "Another way of assuring the maintenance of the level of State and local funding for children in the Title I program is for the applicant to provide State and locally funded instructional staff and related instructional resources directly to the Title I program on a basis that is commensurate with the number of children participating in that program. The latter approach must be followed if the Title I program provides the participating children with all of their instruction in a particular curricular area [Type No. 2 program design] whether or not they receive academic credit for such instruction. In such a program, Title I funds are used to pay only those costs of the program that are in excess of the cost of the 'normal input' of State and local staff and other instructional resources."

[289] OE, in a letter to a state explained that: "These duties have always been performed in Title I and non-Title I schools by personnel who are paid from State and local funds and hence, the use of full-time Title I personnel for this purpose would not be supplementary.

If such duties must be performed by Title I as well as other personnel in order to meet the terms of their employment then the time involved must be compensated for with State and local funds . . . ."

Chapter 12

THE EQUITABLY PROVIDED PROVISION

Chapter 12

The Equitably Provided Provision

I. Statutory Basis and Regulatory Language

Section 101 of the Title I statute [290] provides that Title I funds must be used to "expand and improve" the educational programs of educationally deprived children in low-income areas and to meet their "special" educational needs. The old regulations implemented these statutory provisions, in part, by including the so-called "ordinarily provided provision." [291]

The September 28, 1976 revised regulations have deleted this provision.[292] In its place, the revised regulations now include the so called "equitably provided provision," which states that, before an SEA may approve an application submitted by an LEA it must determine that

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[290] 20 U.S.C. 241a.

[291] The ordinarily provided provision stated that "no project under title I of the Act will be deemed to have been designed to meet the special educational needs of educationally deprived children unless the Federal funds made available for that project...will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with State and local funds to children in non project area schools." 45 C.F.R. §116.17(h)(3)(1974).

[292] The preamble to the revised regulations explains that the "ordinarily provided" regulation is no longer needed "since other provisions of the regulations clearly indicate that services generally provided for all children are not to be paid for from Title I funds..." Comment 2 to §116.40, 41 FR 42896 (September 28, 1976).

> Services are equitably provided to all children with State and local funds without regard to the availability of Title I funds in the applicant's schools for the educationally deprived children. [293]

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[293] 45 C.F.R. §116a.22(b)(10)(1976). The preamble explains that the "ordinarily provided" provision has been replaced by a "similar" provision, i.e., the "equitably provided" provision. Further, the equitably provided provision has been modified "to address the issue of the use of Title I funds by local educational agencies when State and local funds are being used for purposes that are similar to those of Title I,[i.e., for compensatory education programs]." Comment 2 to §116.40, 41 FR 42896 (September 28, 1976). The preamble repeats this point at 42903:

> As indicated in the comments on §116.40, the provision concerning services 'ordinarily provided' with state and local funds is now found in §116a.22 (b)(10), and has been modified to address the use of Title I funds when state and local funds provide services that are similar to those provided under Title I.

II. OE Policies Contained In Correspondence

A. Overview

Letters written by OE in the last few years indicate that the equitably provided standard was applied by OE even prior to the issuance of the revised regulations. These letters further clarify the development and meaning of this standard. In a letter to one state, OE used the concept of equitably provided to explain that Title I areas may not be subject to discrimination in the distribution of SCE funds.

> If ...a local educational agency using State funds were to provide specific compensatory education services exclusively for children in areas not designated for projects, that agency would be violating the provisions of Section 141(a)(3)(B) of Title I and the regulation in 45 C.F.R. §116.17(h) prohibiting the supplanting of State and local funds. ...
>
> The local educational agency would not be complying with the foregoing if it attempted to provide compensatory education services in the Title I areas with Title I funds and to provide similar services in the non-Title I areas with State or local funds. Any State compensatory education program, therefore, should be established so as to make it available on an equitable basis to Title I and non-Title I areas. [Emphasis added.]

More recently, OE stated this policy with greater refinement. In one letter, OE was asked whether or not a newly formed district (two districts which had merged) would be permitted to provide remedial reading services under Title I if such services are also provided through state and local funds in some but not all schools. In response to this query, OE explained:

> First of all, the local educational agency for the newly organized school district should determine how and to what degree various educational services should be provided in the schools of the district. Any such service which cannot be provided for all children must, however, be equitably distributed in Title I and and non-Title I areas before the local educational agency may consider replicating that service with Title I funds (if it meets Title I criteria) or supplementing that service with Title I funded services. *The distribution of such a service to children in Title I and non-Title I areas must be in proportion to the number of children in those areas who qualify for that service according to objective criteria.*
>
> Under the foregoing conditions the local educational agency *could use Title I funds to provide similar services in Title I areas that cannot be reached by the State and locally funded program or to supplement such programs in ways that meet Title I criteria.* In the event that more State-local funds become available for such service the principle of *proportionality* in the distributions of such services among children in Title I and non-Title I areas would have to be maintained.
>
> As you may know, the House Report on the Education Amendments of 1974 indicated a desire on the part of Congress to encourage the use of State and local funds for compensatory education programs. The Office of Education also wishes to encourage the use of State and local funds for this purpose but with the understanding that children in need of such services in Title I areas must have an equal opportunity to receive such services with equally needy children in non-Title I areas. A disproportionate distribution in non-Title I areas of State and locally funded compensatory education programs would preclude the use of Title I funds for similar programs. [Emphasis added.] 294/

294/ Under the revised regulations, equitable provision

In a second letter, an LEA sought guidance from OE concerning the phasing out of kindergarten services provided under Title I and the phrasing in of kindergarten services with State and local funds. In response to this question, OE explained:

> If the State-funded kindergarten services are provided equitably to children in Title I and non-Title I areas then Title I funds may be used to provide additional kindergarten services for children who are not yet being served by the State-funded program. Each year, of course, the number of such children would diminish as the State-funded program continued to expand on an equitable basis into both Title I and non-Title I areas.
>
> The number of classes and the number of children being served by the State-funded kindergarten program should be divided among Title I and non-Title I areas in approximately the same proportion as the number of kindergarten children in those respective areas. For example, if 50 percent of the kindergarten age children reside in Title I areas then at least 50 percent of children to be served in State-funded kindergarten should be from Title I areas.

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of services to Title I areas is a requirement LEAs must meet in order to be eligible at all for Title I funds. The original "ordinarily provided" clause was a restriction on how Title I funds could be spent, rather than a threshold eligibility requirement. This is reflected in the last sentence of the quoted letter, which was written prior to the promulgation of the revised regulations.

In sum, these letters explain that the distribution of services must be in proportion to the number of educationally deprived children residing in Title I and non-Title I school attendance areas[295] who qualify for the services according to objective criteria, e.g., all children below the 25th percentile in reading or all children of kindergarten age.

The sections which follow discuss in greater detail the two components of the equitably provided provision--the objective criteria requirement and the proportional distribution requirement.

It should be noted that in explaining these principles frequent reference is made to "state compensatory education programs" (SCE). Although the equitably provided provision is especially applicable to"SCE programs" (see supra) it is also relevant to the provision of other services including, among other things, transportation, maintenance, summer school,and kindergarten. Thus, to ensure the reader understands that we are only referencing "SCE programs" to illustrate a policy with broader applicability, we have bracketed the phrase each time it appears.

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[295] The letters do not, however, expressly clarify whether the phrases "Title I areas" and "children in Title I areas" mean eligible areas and children or areas and children actually receiving Title I funds. Nonetheless, OE has consistently interpreted the equitable provision concept as applying to eligible areas and children, taken as a whole.

B. The Objective Criteria Requirement

The objective criteria requirement ensures that state and local funds will be distributed without discrimination against children participating in Title I programs. The requirement guards against two types of discrimination.

First, the objective criteria requirement operates to prevent either conscious or unconscious penalization of educationally deprived children residing in low-income areas. It accomplishes this by disallowing subjective methods for determining which children may receive benefits. For example, If [SCE legislation] specified that "any educationally disadvantaged child in the district may participate in the SCE program at the discretion of the LEA," it would be impossible to determine whether children will be chosen to participate in a [SCE program] "without regard to the existence of Title I." If the subjective recommendations of LEA staff members were deciding factors in which children will participate in a [SCE program] such decisions could, consciously or unconsciously, be based on which children do not receive assistance under Title I. The effect of such subjective criteria would be to penalize children participating in

Title I programs in the provision of SCE funds simply because of the existence of Title I funds.

Secondly, the objective criteria requirement ensures that the distribution system will not penalize children eligible for Title I by requiring that the SCE standard be non-discriminatory on its face. For example, the following standard would not satisfy the "objective criteria" requirement: "[SCE funds]must be distributed to educationally deprived children performing below the 25th percentile residing in non-Title I areas."

Although the standard is clear and is not "subjective," i.e., "Quartile I children residing in non-Title I areas," it discriminates, on its face, against Quartile I children residing in Title I project areas.

It would be appropriate for an LEA to distribute SCE funds according to the number of children performing at or below the 25th percentile. Similarly, it would be appropriate if the standard were "below the 50th percentile." Both standards are objective criteria of educational need.[296]

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[296] The objective criterion must be to the need, or degree of need, for the service to be equitably provided. The need for SCE services determines the proportional distribution of SCE funds in Title I and non-Title I areas (the

In sum, the objective criteria requirement ensures that educationally deprived children residing in low-income areas are not penalized or prejudiced in the provision of [SCE funds] because of arbitrary decisions made by LEA staff or because of the existence of an arbitrary standard.

(footnote continued from previous page)

"proportional distribution" requirement is discussed in the next section of the text).

The objective criterion must not finesse the proportional distribution requirement by itself incorporating a pre-determined criterion of ultimate distribution which bears little or no relation to the needs of the children to be served. For example, the objective criterion,"one special reading teacher per school," would--in all but the rarest circumstances, involving sheer coincidence--be unacceptable. The schools might be of different size and might have different numbers of children needing the services of a special reading teacher; the children in different schools might need such services, moreover, to different degrees. Under such circumstances, use of the criterion, "one special reading teacher per school" would not be equitable because it attempts to avoid the proportional distribution requirement by building in a distribution requirement of its own, one that is likely to be irrelevant to the different degrees of need for the service in different schools. Of course, if, through sheer coincidence, the criterion "one special reading teacher per school" were to actually reflect the distribution of the need for special reading teacher services, then it would be an acceptable ultimate criterion of distribution. Its acceptability in this regard, however, presupposes equality of need from school to school under an objective standard of need. Thus, the analysis comes full circle: an objective standard of need first must be established before the validity of any ultimate criterion of distribution can be determined.

In sum, the objective standard employed to meet the objective criteria requirement must be a standard reflecting need for the service to be provided. It must not be a standard which makes presuppositions that do not, in fact, reflect reality.

Objective, non-discriminatory distribution criteria for [SCE funds]are essential. We recommend that LEAs be required in their Title I applications to set forth in detail the objective criteria used to distribute SCE funds.

C. The Proportional Distribution Requirement

In many cases [SCE funds]will not be sufficient to provide services to all children eligible under the objective criteria selected. In this situation, where some but not all potential beneficiaries will receive services, [SCE funds]must be proportionally distributed.[297]

For example, assume that (a) a [SCE program]incorporates the objective criterion that[SCE funds]will be distributed in equal amounts per eligible child to meet the needs of educationally deprived children in grades K-6 performing below the 25th percentile; (b) 30 percent of the children performing below the 25th percentile reside in Title I eligible areas; (c) the [SCE program]is underfunded so that

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This analysis of the objective criteria requirement, it should be noted, applies only to funds not governed by the Title I comparability requirement i.e., SCE funds which an LEA seeks to have excluded from comparability. The Title I comparability requirement employs a standard which reflects the distribution of more than one service. In a given school, underfunding of one service can be counterbalanced by greater funding of another, with the result being full satisfaction of the comparability requirement. The equitably provided requirement was not intended to change this result for services and funds governed by the comparability requirement.

[297] Allocation of more than a proportionate share of Title I eligible areas is acceptable.

not all those eligible under the objective criterion can be served; and (d) the State does not require LEAs to distribute limited [SCE funds] to schools in rank order, according to the incidence of educational deprivation.

Because 80 percent of the eligible children reside in Title I eligible areas, the LEA, under the proportionality requirement must distribute, at a minimum, 80 percent of its SCE appropriations in Title I eligible areas. The distribution within Title I areas must be made without discriminating against children who would have received assistance under the [SCE program] but for the existence of Title I.

Chapter 13

THE COMPARABILITY PROVISION

Chapter 13

The Comparability Provision

I. Introduction

The comparability requirement is intended to ensure that services provided with state and local funds to educationally deprived children attending schools in project areas are comparable, i.e., approximately equal to services provided to children attending non-project area schools, before the addition of Title I funds for project area schools. In other words, this requirement ensures that Title I funds will be used to provide additional services to project area schools.

The general purpose of the comparability provisions in relationship to the basic premise of the entire Title I legislation was expressed on the House floor by Congressman Quie of Minnesota (Volume 116, Part 8, 91st Congress, 2nd Session, at p. 10013):

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children this purpose is defeated...

The requirement, as set forth in Title I legislation, provides that:

> State and local funds will be used in the district[of the LEA] to provide services in project areas which, taken as a whole, are at least *comparable* to services being provided in areas in such district which are not receiving funds under this title. [298] (emphasis added).

II. *Basic Criteria For Demonstrating Comparability*[299]

In general, the comparability regulations provide that the SEA must *not approve* a LEA Title I application *or* make payments of Title I funds *under a previously approved application*

> unless that local educational agency has demonstrated, in accordance with *paragraph (e) of this section*, that services provided with State and local funds...in Title I project areas *are at least comparable* to the services being provided with such State and local funds in schools serving attendance areas not designated as Title I project areas. [300]

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[298] Section 141(a)(3)(C) of Title I (20 U.S.C. 241e(a)(3)(C)).

[299] 45 C.F.R. §116a.26(a)(1976). It should be noted that a separate report demonstrating comparability must be submitted by LEAs which have been designated by the Commissioner as enrolling substantial numbers of children of *migratory workers*. 45 C.F.R. §116a.26(g)(1976)

[300] 45 C.F.R. §116a.26(a)(1976).

Paragraph (e) of §116a.26 of Title 45 of the Code of Federal Regulations generally states that services being provided by the LEA with State and local funds in a project area will be comparable to the services being provided with State and local funds in nonproject areas if each Title I school has ratios of children to instructional staff [301] and expenditures per child [302] that are, at least, nearly equal to those ratios for the average of the schools not receiving Title I funds. The regulations

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[301] Under the revised regulations "instructional staff members" means

> members who render direct and personal services which are in the nature of teaching or the improvement of the teaching-learning situation. The term includes teachers, principals, consultants, or supervisors of instruction, librarians, and guidance and psychological personnel it also includes aides or other paraprofessional personnel including clerical personnel employed to assist such instructional staff members in providing such services.

45 C.F.R. §116a.26(b)(1976). The comments to the revised regulations indicate that this broad definition of instructional staff members is required both to implement Congressional intent and because "principals, librarians and special instructional personnel do affect the quality of instructional services..." Comment 8 to §116a.26, 41 FR 42902 (September 28, 1976).

[302] The revised regulations (45 C.F.R. §116a.26(b)(1)(1976)) specify the methodology to be used for counting the "number of children enrolled" for purposes of determining compliance with the comparability ratios. LEAs are instructed to

1. count children enrolled in less than full-day kindergarten programs on a full-time equivalency basis.

2. take into account state or local educational finance plans that include weighting factors for children in certain educational categories, age groupings or grade levels when determining the number of children

specify that services will be considered comparable in Title I schools if:

> (a) the number of children enrolled per instructional staff member...for each public school serving a Title I project areas is not more than 105 percent of the average number of children per instructional staff member in all other public schools in the applicant's district; [303] and (b) the annual expenditure per child [for instructional staff, exclusive of longevity], in each public school serving a Title I project area is not less than 95 percent of such expenditure per child in all other public schools in the applicant's district. [304]

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> enrolled for purposes of comparability reporting. This adjustment may only take place "with the approval of the [SEA]."

The comments indicate that such weightings may be taken into account provided they are reasonable and uniformly applied. Comment 11 to §116a.26, 41 FR 42902 (September 28, 1976).

[303] 45 C.F.R. §116a.26(e)(1)(1976).

[304] 45 C.F.R. §116a.26(e)(2)(1976). Section 116.26(b)(1974) of the old regulations required that the comparability report submitted by the LEAs to the SEA contain the total portion of salaries for instructional staff members based on length of service (longevity), however, longevity was not included for purposes of computing the ratio of expenditures per pupil for instructional salaries. The revised regulations do not require the reporting of longevity data.

Section 116.26(c)(3)(1974) of the old regulations provided that any LEA which was non-comparable in either of the two ratios described supra must demonstrate that the expenditure per child for textbooks, library resources, and other instructional materials and supplies in each public school serving a project area is not less than 95 percent of such expenditure per child in all other public schools in the district.

The above provision has been deleted from the revised regulations. The revised regulations now require that LEAs annually file with the SEA

> A statement of the specific policies and procedures adopted by the [LEA] to assure that textbooks, library resources, and other instructional materials and supplies are provided for each school serving a Title I project area on a basis that is comparable to that for non-project areas. 305/ (emphasis added)

305/ 45 C.F.R. §116a.26(h)(3)(1976).

III. Date For Collecting Data And For Submitting Comparability Reports To The SEA

Section 116.26(b)(1974) of the old regulations specified that the data required by the comparability report must be collected as of a date not later than November 1, as specified by the Commissioner.

Under the revised regulations, [306] SEAs are now allowed to set the date on which data for comparability reporting will be collected within their State. The date selected by the SEA must still be prior to November 1 and is to be as close to October 1 as possible.

The revised regulations have retained the old policy of allowing the LEA, with the approval of the SEA, to submit data based on averages for a definite school reporting period which includes the date specified by the SEA. [307] However, the OE comments contained in the preamble[308] explain that if the initial draft comparability report prepared by the LEA does not demonstrate comparability and the LEA must reallocate resources to demonstrate comparability, the revised comparability report must contain data "as of one date, the date that the reallocation of resources actually takes effect."

The comparability report, which includes the collected data described above, must be filed with the SEA no later than December 1 of each year. [309]

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[306] 45 C.F.R. §116a.26(c)(1976).

[307] Id.

[308] Comment 12 to §116a.26(f)(1), 41 FR 42902 (September 28, 1976).

[309] 45 C.F.R. §116a.26(d)(1976).

IV. Maintenance of Comparability

An SEA may not approve an LEA's application unless the LEA includes an assurance that it will maintain comparability throughout the year.[310] The assurance must be filed with the SEA on or before July 1 of each year and expressly state that the comparability previously demonstrated will be maintained.[311]

In addition, the July 1 submission must include data showing that schools serving attendance areas that will be designated project areas for the next fiscal year, but were not so designated in the preceding fiscal year, would have been comparable during the preceding year, or will, as a result of specific action by the LEA, be comparable during the next fiscal year.[312]

Finally, the LEA must maintain records "by individual schools" demonstrating that comparability is being maintained for the entire school year.[313] These reports must be made readily accessible to federal state and local officials, as well as the general public.[314]

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[310] 45 C.F.R. §116a.26(a)(1976).

[311] 45 C.F.R. §116a.26(h)(1)(1976).

[312] 45 C.F.R. §116a.26(h)(2)(1976).

[313] 45 C.F.R. §116a.26(m)(2)(1976).

[314] Id.

V. Recordkeeping Requirements

In addition to the general recordkeeping requirements applicable to LEAs, [315] the Title I regulations include specific recordkeeping requirements pertaining to comparability reporting. [316] Specifically, the regulations require that LEAs maintain by individual schools: (a) appropriate resource records (including records of children's enrollment), [317] (b) worksheets showing the total number of instructional staff as well as their salaries less longevity, [318] (c) appropriate records documenting eligibility for exemptions from comparability reporting described *infra*, [319] and (d) as explained in the previous section, records demonstrating maintenance of comparability. [320]

VI. Grouping of Schools

A. Number of Groups

The general rules concerning the grouping of schools within a typical school district (grades K-12) provide that the LEA must group its schools according to "corresponding grade levels not to exceed three such groups." 321/ However, the regulations do include certain exceptions to these general rules.

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[315] See Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)).

[316] 45 C.F.R. §116a.26(m)(1976).

[317] 45 C.F.R. §116a.26(m)(1)(i)(1976).

[318] 45 C.F.R. §116a.26(m)(1)(ii)(1976).

[319] 45 C.F.R. §116a.26(m)(1)(iii)(1976).

[320] 45 C.F.R. §116a.26(m)(2)(1976).

First, where a K-12 district has some schools serving eight or more grade levels above kindergarten, such schools may be considered as a separate group constituting, if necessary, a fourth group. 322/

Second, if a school district only includes grades K-7 (rather than K-12), it must include all the schools in one group. 323/ If the district only serves children above the sixth grade level, e.g., 6-9 or 9-12, the LEA may divide the schools into: (a) two groups if the total number of grades is five or six, e.g. 6-10 or 6-11, and (b) one group if the total number of grades served is four or less, e.g., 9-12. 324/

Third, if the LEA provides education at eight or nine grade levels above kindergarten, there can only be two groupings. 325/

Finally, a school serving grades in two or more groups must be included in that group with which it has the greatest number of grades in common. 326/

321/ 45 C.F.R. §116a.26(i)(1)(1976).

322/ 45 C.F.R. §116a.26(i)(3)(1976).

323/ 45 C.F.R. §116a.26(i)(1)(1976).

324/ Id.

325/ Id.

326/ 45 C.F.R. §116a.26(i)(2)(1976).

B. Economies of Scale

The major change in the school grouping system included in the revised regulations is found in 45 C.F.R. §116a.26(i)(4) which allows LEAs to divide a single grade span into two groups (one for the larger schools and one for the smaller schools) if "for a particular grade span, one school has an enrollment that is at least two times that of another...". 327/

VII. Exemptions For Certain LEAs

A. Schools With 100 or Less Children

The regulations generally provide that a school with an enrollment f less than 100 should not be included in the comparability report, provided that

> *if* the local educational agency operates schools of such size and corresponding grade levels *both* for areas to be served and areas not to be served under Title I, such agency *files* with the State educational agency a *statement of the policies it will follow concerning* the allocations of staff to such schools and the State educational agency finds that such policies are consistent with the objectives of this section. 328/

B. LEAs Receiving Substantial Federal Funds

Section 116a.26(o)(1976) has been added to the regulations exempting LEAs that receive at least 95% of their funds for education from federal sources from meeting the comparability requirements.

327/ Schools with enrollments of 100 or less are *not* to be included in determining the size of the smallest schools. (In addition, schools of less than 100 do not have to be included in comparability reporting. See discussion of comparability exemptions *infra*.).

328/ 45 C.F.R. §116a.26(k)(1976).

C. Additional Exemptions

The regulations[329] make the comparability provisions not applicable to LEAs

1. which operate only one school serving children at the grade levels at which Title I services are to be provided or
2. which have designated the whole school district at a project area under the no-wide variance provision. [330]

VII. Exclusion For Expenditures Under State and Local Compensatory Education Programs Comparable to Title I and Other Special Programs

Prior to 1974, LEAs were required to include both SCE and bilingual funds in their comparability calculations. The 1974 Education Amendments changed this. [331] In a provision stating that Title I funds may pay only for the "excess costs" of programs and projects, Congress indicated that at the LEA's option the definition of "excess costs" need not include expenditures for

> any comparable State or local special programs, for educationally deprived children or expenditures for bilingual programs or special education for handicapped children or children with specific learning disabilities, if such expenditures for bilingual education and special education are used to provide, to children of limited English-speaking ability and handicapped children, and children with specific learning disabilities who reside in title I project areas, services which are comparable to those provided to similarly disadvantaged children residing in nonproject areas. [332]

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[329] 45 C.F.R. §116a.26(L)(1976).

[330] The "no-wide variance provision" is discussed infra, at p. 48 .

[331] P.L. 93-380.

[332] §403(17) of P.L. 81-874, as amended by the 1974 and 1976 Education Amendments.

Section 116a.26(j)(5)(1976) of the revised regulations implements the statutory change with respect to SCE programs by allowing LEAs, at their option, to exclude state and/or local compensatory education funds from their comparability determinations if such funds support a program that meets the following four criteria

- participants are "educationally deprived children" as defined under Title I;
- the program is based on performance objectives related to educational achievement and provides supplementary services designed to meet the special educational needs of those particular children;
- the program is evaluated in a manner consistent with those program objectives and
- for purposes of determining compliance with the above criteria, the LEA is separately accountable to the SEA for any State or local funds expended for such program.

With respect to expenditures under bilingual and handicapped programs, the regulations allow LEAs, at their option to exclude these funds as well as SCE funds.[333] However, in accordance with the language of the statute, LEAs excluding expenditures under bilingual and handicapped programs must submit "mini-comparability reports" demonstrating that services provided with funds under these special programs in non-project areas are comparable to those services provided in project area schools. [334]

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[333] 45 C.F.R. §116a.26(j)(1) and (2)(1976). The regulations devise separate methodologies for excluding appropriate funding (a) where eligible children are enrolled full-time in special education classes and (b) where such children are not enrolled full-time. Where eligible children are enrolled full-time in special education classes, LEAs may exclude: "all those children, the teachers and other instructional

LEAs taking advantage of the option to exclude SCE, bilingual and handicapped program funds are required by the regulations to maintain by individual schools "appropriate records documenting the exclusions." [335]

Section 116a.26(b)(6)(1976) of the regulations requires that the comparability report submitted by the LEAs include "the number of children and of members of instructional staff and expenditures for such staff, if any, that were excluded from [comparability] determinations."

(footnote continued from previous page)

staff members who serve them and instructional expenditures for such staff...". 45 C.F.R. §116a.26(j)(1)(1976). Where eligible children are not enrolled full-time in special education classes, the LEA may exclude expenditures for bilingual and special education programs and may also exclude "the staff employed with state and local funds. If expenditures for staff and numbers of staff are excluded in accordance with the preceding sentence, then the full-time equivalent number of children served under such programs may also be excluded." 45 C.F.R. §116a.26(j)(2)(1976).

[334] 45 C.F.R.§116a.26(j)(3)(1976).

[335] 45 C.F.R. §116a.26(m)(iii)(1976).

IX. *Enforcement Scheme*

Section 116a.26(f)(1976) of the revised regulations entitled, "Action by State Agency in Cases of Non-Comparability" sets out, in a single paragraph,[336] the enforcement scheme SEAs must follow where any schools serving a Title I project area are non-comparable.

Under the regulations, if an LEA's initial comparability report does *not* demonstrate comparability according to the two criteria described *supra*, and the LEA does *not* submit a *revised* comparability report by December 1, demonstrating that the LEA *is* comparable, "the State Educational Agency *shall* as of that December 1 *suspend* its approval of the project until the date such a report is submitted to that agency."[337]

The regulations set *March 31* as the last day for filing a revised comparability report.[338] If an LEA files a revised report by March 31, the SEA may lift the suspension.[339]

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[336] Under old regulations the enforcement scheme was contained in two paragraphs, 45 C.F.R. §116.26(c) and §116.26(k)(1974).

[337] 45 C.F.R. §116a.26(f)(1)(1976).

[338] *Id.*

[339] *Id.* The comments state that a LEA board resolution is *not* acceptable evidence of the reallocation of personnel that is required when a revised comparability report is submitted. "Comparability is measured in terms of the status of services at points in time" and intent is not a measure of services. Comment 13 to §116a.26, 41 FR 42902 (September 28, 1976).

However, the regulations also provide that "no Title I funds may be used to pay for obligations incurred by a local educational agency during a period of suspension under this section."[340]

If a revised comparability report is not submitted by March 31, the SEA must finally disapprove the LEA's application and reallocate all unobligated funds as of December 1 to other compliant LEAs pursuant to the reallocation procedures specified in §116a.11 of the regulations.[341] However, before the SEA reallocates a non-compliant LEA's unobligated funds, it must notify the LEA that it will reallocate such funds and provide the LEA with an opportunity for a hearing.[342]

A distinct enforcement scheme is provided in the regulations for those LEAs which have failed to maintain comparability throughout the year. If a SEA finds that an LEA has not maintained comparability and "has not taken prompt action to correct that lack of comparability" the SEA shall suspend approval of the project until comparability is again achieved.[343] The comments indicate that the question of

> whether a [LEA] acted 'promptly' to correct its non-compliance status would have to be determined on a case-by-case basis depending on such factors as the amount of corrective action needed, the size of the school district, and the compliance history of that district for that year."[344]

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[340] 45 C.F.R. §116a.26(f)(4)(1976).

[341] 45 C.F.R. §116a.26(f)(2)(1976).

[342] Id. Hearing Procedures are described in 45 C.F.R. §116.6(b)(1976).

[343] 45 C.F.R. §116a.26(f)(3). The requirement that LEAs maintain comparability was described supra, at p. 203 .

[344] Comment 16 to §116a.26, 41 FR 42902 (September 23, 1976).

X. SEA Submissions to the Commissioner

State Educational Agencies are required to submit to the Commissioner reports concerning compliance with the comparability requirements.[345] Basically, SEAs must submit three reports. First, by January 1, of each year the SEA must submit "a copy of the comparability report for each [LEA] in the State which the Commissioner has determined to be in a national sample of such agencies for that year."[346]

Second, by January 1 of each year the SEA must submit a report identifying each LEA that was non-comparable as of December 1 and indicating for each such LEA either that

> 1) [the LEA]has allocated or reallocated sufficient additional resources to Title I project areas so as [to be comparable] and has filed a revised comparability report...or
>
> 2) the [SEA] is withholding the payment of Title I funds to the noncomplying [LEA].[347]

The SEA is required to include a copy of each revised comparability report as part of this submission.[348]

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[345] 45 C.F.R. §116a.26(n)(1976).

[346] 45 C.F.R. §116a.26(n)(1)(1976).

[347] 45 C.F.R. §116a.26(n)(2)(1976).

[348] 45 C.F.R. §116a.26(n)(3)(1976).

Third, the SEA must report to the Commissioner by April 30 whether any "non-complying [LEAs] have come into compliance." 349/ The SEA must include in this report copies of any revised comparability reports received from previously noncomparable LEAs.

349/ 45 C.F.R. §116a.26(n)(4)(1976).

Chapter 14

THE GENERAL AID PROVISION AND PROVISIONS CONCERNING THE USE OF TITLE I FUNDS FOR CONSTRUCTION AND EQUIPMENT

Chapter 14

The General Aid Provision And Provisions Concerning The Use Of Title I Funds For Construction And Equipment

I. The General Aid Provision

The Congressional Declaration of Policy set forth in the Title I legislation provides, in relevant part, that the purpose of Title I is to provide financial assistance to LEAs to expand and improve educational programs "which contribute particularly to meeting the special educational needs of educationally deprived children." 350/

Since Congress earmarked Title I funds for the specific purpose of meeting the special educational needs of educationally deprived children, the use of Title I funds for general aid purposes, i.e., for the purpose of aiding an entire school or school district, is prohibited by the regulations. Specifically, the regulations provide that before the SEA may approve an LEA's application, it must determine that:

> The expenditures for the project (as set forth in the budget) are...proposed for use solely to meet the special educational needs of educationally deprived children identified in accordance with §116a.21 [needs assessment provision described supra, on p. 97] [and]
>
> The project has not been designed to meet, nor will it have the effect of meeting, the general needs of schools or of the student body at large in a school or of a specified grade in a school. 351/

The regulations also require the SEA to find that

> Any services or resources provided under Title I will be offered to only those children who have been selected to participate in the project in accordance with §116a.21, except as approved in accordance with paragraph (b)(9). [participation of children who reside

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350/ Section 101 of Title I (20 U.S.C. 241a).

351/ 45 C.F.R. §116a.22(b)(4)(iii) and (b)(6)(1976). Recent legislative history explained the purpose of the general aid prohibition by stating: "Funds are [to be] concentrated on the priority needs of poor children and are not [to be] diverted to meeting other needs of school systems, however pressing these other needs may be." (S. Rpt. No. 91-634, (1970) U.S. Code Cong. and Adm. News 2727) outside project areas].[352]

With respect to services provided to Title I children in their regular classroom, the revised regulations expressly state that:

> If services are provided in the regular classroom or in other settings in which children other than those properly selected to participate in the project will be present, these services will be directed to the selected children and the effectiveness of the project will not be impaired by the presence of children other than those selected to participate.[353]

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[352] 45 C.F.R. §116a.22(b)(7)(1976). In response to a letter from one State Title I Director concerning the use of Title I paid teacher aides for hall duty, cafeteria duty, etc., OE explained:

> "Your inquiry relates specifically to the use of Title I aides for 'cafeferia supervision, bus duty, playground duties, library duties and corridor supervision. Such functions are not part of any Title I programs and, therefore, compensation for carrying out such functions must be provided with state and local funds. It would be a violation of Title I requirements for an aide being paid entirely with Title I funds to perform such functions."

[353] 45 C.F.R. §116a.22(b)(8)(1976). The comments contained in the preamble indicate that the proposed regulations were modified make it clear that

> While Title I services may be provided for identified children in their particular classrooms or in other similar settings with other children present, Title I services must be directed only to the selected Title I eligible children.

Commentors had expressed the fear that stating that Title I services could be offered in the presence of non-participating children might be interpreted as allowing Title I funds to be used for general aid. Comment 2 to §116a.22, 41 FR 42899 (September 28, 1976).

II. Provisions Concerning the Use of Title I Funds For Construction and Equipment

The Title I legislation [354] expressly authorizes LEAs to use Title I funds for purchasing equipment [355] and constructing facilities. [356] Because of the potential danger that buildings

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(footnote continued from previous page)

In response to a letter concerning the use of teacher aides paid for with Title I funds in the regular classroom, OE explained:

> "There is no statutory requirement that a Title I aide or paraprofessional must be under the direct supervision of a Title I teacher. Thus it would be proper for a Title I aide or paraprofessional to be hired to assist a regular classroom teacher in order to free the teacher to perform Title I functions, or so that the aide may perform Title I functions as instructed by the teacher. However, it is important to note that the mere assignment of a teacher aide to a regular classroom teacher does not constitute a Title I program.

[354] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)) provides, among other things, that payments under Title I may be used for "the acquisition of equipment" and "where necessary, the construction of school facilities and plans made...for such... facilities."

[355] "The term 'equipment' includes machinery, utilities and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services including items such as instructional equipment and necessary furniture, printed, published and audio-visual instructional materials, and books, periodicals, documents, and other related materials." Section 403(14) of P.L. 81-874 (20 U.S.C. 244(14)).

[356] "The term 'construction' includes the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, improving, or extending school facilities; and the inspection and supervision of the construction of school facilities." Section 403(12) of P.L. 81-874 (20 U.S.C. 244(12)).

and equipment paid for with Title I funds will be used to generally benefit all children and the school district as a whole rather than particularly serving the needs of educationally deprived children, the regulations contain specific restrictions and requirements concerning the purchase of equipment and the construction of school facilities. The most important restrictions and requirements are set forth below.

The regulations generally disfavor the use of Title I funds for construction. Funds can be used for the construction of public school facilities[357] "only if it is demonstrated as being essential to the success of a program or project under Title I ."[358]

A second restriction is that Title I projects cannot include construction costs if a SEA "finds that such construction would tend to maintain the racial, cultural, or lingusitic isolation of children."[359]

--A third requirement is that the LEA's application describe (a) the need for such equipment or construction and (b) how all equipment facilities purchased with Title I funds are to be used. Specifically, the regulations provide that:

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[357] See infra. for a discussion of construction with respect to private school facilities.

[358] 45 C.F.R. §116.32(a)(1976). The comments indicate that this sentence is designed to be a "generally applicable standard" and that SEAs may request additional information from the LEAs to make case-by-case determinations of the necessity for requested construction or equipment. Comment to §116.32, 41 FR 42896 (September 28, 1976).

[359] 45 C.F.R. §116.32(b)(1976).

> Each application shall describe the need for such equipment or construction, in addition to other equipment or facilities previously acquired or constructed by the applicant with funds under Title I and for which the applicant is accountable, in connection with the proposed project. The applicant shall further describe how all such equipment or facilities will be used. 360/

Fourth, Section 116.42(a)(1976) of the revised regulations requires that a public agency exercise control over all equipment purchased with Title I funds but also specifies that such control must be "consistent with §100b.215 and §100b.216 of [GEPA]." Section 116.42(c)(1976) requires that the LEA include in its application an assurance that a public agency will control and administer Title I funds and property.

Fifth, the revised regulations permit the "incidental" use of Title I property for purposes not included in the Title I program design, but "only for related educational purposes on public premises and only so long as such use does not interfere with the carrying out of a Title I project." 361/

360/ 45 C.F.R. §116.32(a)(1976).

361/ 45 C.F.R. §116.42(a)(1976). A letter from OE to an LEA concerned the question of "whether school buses purchased with Title I funds may be used to transport non-Title I students...'provided this service does not interfere with the regular Title I Reading transportation program.' " OE interpreted the phrase "incidental use" by explaining what the phrase does not mean. OE explained, "we do not...consider the regular daily use of such buses for non-Title I purposes to be an 'incidental use.' "

In summary, the OE letter explained that the district had the following obligations:

Finally, the regulations issued under the General Education Provisions Act (GEPA) which are applicable to all federal aid programs, including Title I, provide that LEAs must properly manage property purchased with federal funds.[362] These regulations provide, among other things, that LEAs must maintain property records indicating the "location, use, and condition of the property"[363] and undertake a physical inventory of property and reconcile the results with the property records "at least once every 2 years to verify the existence, current utilization, and continued need for the property."[364]

(footnote continued from previous page)

> (1) To provide with State and local funds a sufficient number of vehicles for the transportation of its children to school,
>
> (2) To utilize those vehicles as much as needed in its Title I programs (Title I funds may be used to cover additional operating expenses),
>
> (3) To provide needed additional vehicles with Title I funds but only to the extent that the transportation requirements of the Title I program cannot be met using vehicles acquired with State and local funds,
>
> (4) Remove its obligations on the use of any surplus Title I buses by selling them or paying the Federal Government for their fair market value.

[362] 45 C.F.R. §100b.215(d)(1976).

[363] 45 C.F.R. §100b.215(d)(1)(vi)(1976).

[364] 45 C.F.R. §100b.215(d)(2)(1976).

Chapter 15

INFORMATION DISSEMINATION AND ACCESS TO INFORMATION

Chapter 15

INFORMATION DISSEMINATION AND ACCESS TO INFORMATION

I. Introduction

The Title I legislation and regulations contain requirements governing dissemination of education information and access to information relevant to the administration of Title I programs and projects. Since these requirements are related, they both will be described in this chapter.

II. Dissemination of Educational Information

Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10)) generally provides that each LEA must develop effective procedures for:

> acquiring and disseminating to teachers and administrators significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects.

The Title I regulations[365] require that each LEA application describe the methods which the LEA will use to review, select, and disseminate to teachers and educational administrators

> significant information on the latest developments and most recent experiments in education so that such information will be available for use in program planning and operation.

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[365] 45 C.F.R. §116.44(1976).

The regulations[366] also specify some of the ways in which LEAs can meet this information dissemination requirement. These methods include, but are not limited to, "in-service education, professional workshops and seminars, consultations and visitations, and reports on the organization, operation, and outcome of projects under Title I."

III. Dissemination of and Access to Title I Information

A. Introduction

The Title I legislation contains two requirements related to the dissemination of and access to Title I information. The first requirement generally governs public and parental access to Title I information and the second specifically governs access to Title I information by parent advisory councils (PACs). First, §141(a)(8) of Title I (20 U.S.C. 241e(a)(8)) requires the SEA to determine that "the [LEA] is making the application and all pertinent documents related thereto available to parents and other members of the general public. . . ." This same statutory provision also requires that ". . .all evaluations and [required reports] shall be public information."

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[366] *Id.* The requirements governing in-service training are discussed in the chapter on Program Design. *See supra*, pp. 116 - 120.

Second §141(a)(14)(D) of Title I (20 U.S.C. 241e(a)(14)(D)) requires that the LEA, in accordance with OE regulations, provide both the school and district PAC with "access to appropriate information concerning such [Title I] programs and projects." [367/]

This chapter will describe the general access to information requirements. Specific provisions applicable to PACs are described *supra*

Specifically, this chapter describes (a) LEA plans for disseminating information which must be included in the Title I application; (b) documents which must be made available upon request; (c) information which may *not* be made available, (d) prescriptions concerning the reproduction of information, and (e) how long such information must be retained.

B . The Contents of the LEA Application

Each LEA must include in its application "specific plans" for disseminating to the general public and parents information pertaining to (1) the provisions of Title I and (2) the LEA's past and present Title I programs -- including evaluations of such programs.[368/] In addition, the plans must also include

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[367/] *See* the chapter on Parent Involvement, *supra*, pp. 160-*161*, for a description of the documents which must be provided to parent advisory councils.

[368/] 45 C.F.R. §116.45(1976).

certain provisions, discussed below, for the reproduction of documents.

C. Documents That Must be Made Available Upon Request

The LEA must make available upon request all "documents as may be reasonably necessary to meet the needs of such parents or other members of the public for information related to the comprehensive planning, implementation, and evaluation of the Title I program."[369/] The regulations[370/] specifically list types of documents which must be made available upon request: (1) past and present Title I applications, (2) evaluations of past projects, (3) all reports required by §116.46 to be submitted to the SEA,[371/] and (4) comparability reports.

D. Information That May Not Be Made Available

The regulations[372/] contain one important qualification to

[369/] Id.

[370/] Id.

[371/] 45 C.F.R. §116.46(1976) is described in the chapter on LEA Reporting at p. 226-227.

[372/] Id. Dissemination of information related to the performance of identified children would violate the privacy rights of specific children in contravention of Section 438 of GEPA (20 U.S.C. 1232g). This section, commonly referred to as the "Buckley Amendments," is more fully described in the chapter concerning Parent Involvement.

the broad range of information that must be made available upon request. LEAs may not disseminate or make available upon request "information relating to the performance of identified children and teachers."[373/]

E. The Reproduction of Information

The "specific plans" which must be contained in the LEA application must include at least one of two approaches to reproducing Title I information. The "specific plans" must include either (1) "provision for the reproduction, upon request, of such documents free of charge, or at reasonable costs (not to exceed the additional costs incurred which are not covered by Title I funds)" or (2) "provisions whereby persons requesting such copies will be given adequate opportunity to arrange for the reproduction of such documents."[374/]

[373/] *Id.*

[374/] 45 C.F.R. §116.45(1976).

F. Information Availability Requirements

The regulations provide that such information and documents "shall be available" (1) until the expiration of five years after the completion of a Title I project or (2) until any impending audit by HEW or the General Accounting Office (GAO) (consistent with 434(a) of GEPA) "has been completed and the questions arising out of it have been resolved."[375]

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[375] Id.

Chapter 16

LEA REPORTING AND RECORDKEEPING

Chapter 16

LEA REPORTING AND RECORDKEEPING

I. Introduction

The Title I and GEPA legislation and regulations contain reporting and recordkeeping requirements which generally provide the means for verifying that Title I funds are used in a manner consistent with the other Title I requirements described supra.

II. LEA Reporting

The Title I legislation[376] provides, in relevant part, that each LEA must submit (1) an annual report to the SEA, (2) submit such other reports to the SEA "as may be reasonably necessary to enable the [SEA] to perform its duties under [Title I]." The regulations[377] implementing these statutory requirements provide that each LEA must provide an assurance in its application that it will submit to the SEA "an annual report and such other reports, in such form and containing such information . . . as may be reasonably necessary to enable the [SEA] to perform its duties under Title I." The information contained in such reports must include "the results of objective measurements of educational achievement and program effectiveness

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376/ Section 141(a)(7) of Title I(20 U.S.C. 241e(a)(7)).

377/ 45 C.F.R. §116.46(1976).

required by §116.43 and of research and replication studies."[378] The regulations[379] also indicate that, in the case of reports relating to performance, the information supplied "shall have been developed in accordance with specific performance criteria related to program objectives."

In addition to the information concerning the evaluation of Title I programs, the Title I regulations[380] require that, with certain exceptions, each LEA submit an annual comparability report to the SEA.

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[378] Id. 45 C.F.R. §116.43 requires an LEA to describe in its Title I application techniques to be used in making at least annually an evaluation of the effectiveness of the Title I program.

[379] Id.

[380] 45 C.F.R. §116a.26(b)(1976). The regulations authorize four exceptions to this annual comparability reporting requirement: (1) an LEA with schools with an enrollment of 100 or less children in Title I as well as non-Title I areas (45 C.F.R. §116a.26(k)(1976)), (2) LEAs operating only one school serving children at the grade levels at which Title I services are to be provided (45 C.F.R. §116a.26 (1)(1976)), (3) LEAs which have designated the whole of the school district as in project areas under the "no-wide variance provision." Id. (The "no-wide variance provision" is discussed *infra*, at p. 48.) and (4) LEAs which receive at least 95 percent of their funds for education from Federal sources (45 C.F.R. §116a.26(o)(1976)). These exceptions to the comparability requirement are described in the chapter on the Comparability Provision infra, at pp. 206 - 207.

III. LEA Recordkeeping

With respect to recordkeeping, the Title I and GEPA legislation provides, in relevant part, that each LEA must (1) retain records and afford access to such records as the SEA "may find necessary to assume the correctness and verification"[381/] of LEA reports; (2) retain such records "as the Assistant Secretary [of Education] may prescribe;"[382 /] (3) afford access to such records "for the purpose of audit and examination"[383/] and (4) make available to parents and other members of the general public the Title I application, all pertinent documents relating to the application, and all evaluations and reports prepared by the LEA which are submitted to the SEA.[384/]

381/ Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)).

382/ Section 434(a)(1) of GEPA (20 U.S.C. 1232c(a)(1)). Such records must include records "which fully disclose the amount and disposition by [the LEA]. . . of the proceeds of [Title I]. . . the total cost of the project or undertaking in connection with which such funds are given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit." Id.

383/ Section 434(a)(2) of GEPA (20 U.S.C. 1232c(a)(2)). See 45 C.F.R. §100b.477(1976) of the GEPA regulations governing record retention.

384/ Section 141(a)(8) of Title I (20 U.S.C. 241e(a)(8)).

Chapter 17

THE LEGAL FRAMEWORK OF TITLE I AS IT RELATES TO THE PARTICIPATION OF CHILDREN ATTENDING PRIVATE SCHOOLS

Chapter 17

THE LEGAL FRAMEWORK OF TITLE I AS IT RELATES TO THE PARTICIPATION OF CHILDREN ATTENDING PRIVATE SCHOOLS

I. General Statutory Overview

Title I is the first Federal aid-to-education program authorizing assistance for private school children as well as for children attending public schools. The Title I legislation recognizes that all educationally deprived children residing in areas having high concentrations of children from low-income areas [385/] do not necessarily attend the public schools. Since the legislative aim was to provide assistance to educationally deprived children[386/] rather than to specific schools, it was thought necessary to include eligible private school children among the beneficiaries of the Act.

Under the administrative structure established by Title I, the primary responsibility for designing and effectuating special educational services and arrangements for educationally deprived children attending private schools rests with the LEA.[387/] It is the LEA which must make provision for including special educational services and arrangements in which such children may participate.

[385/] Section 141(a)(1)(A) of Title I, (20 U.S.C. 241e(a)(1)(A)), and Section 141A of Title I, (20 U.S.C. 241e-1).

[386/] *See generally* Section 101 of Title I, (20 U.S.C. 241a).

[387/] Section 141A(a) of Title I (20 U.S.C. 241e-1(a)).

The State, through its SEA, may not approve an application by an LEA unless the LEA provides a satisfactory assurance that it will comply with Section 141A of the Act pertaining to the participation of children enrolled in private schools.[388]

Section 141A(a) of Title I (20 U.S.C. 241e-1(a)) provides, in addition to the above requirement that the LEA must make provision for including special educational services and arrangements in which educationally deprived children attending private schools may participate, that:

(1) the services and arrangements may include dual enrollment, educational radio and television and mobile educational services and equipment;

(2) Title I programs and projects for children in private schools must meet the requirements of Section 141(a)(1)(A) and (B) of Title I (20 U.S.C. 214e(a)(1)(A) and (B)) which generally provides that payments under Title I may be used for the excess costs of programs and projects which are designed to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income areas and which are of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs;

(3) Title I programs and projects for children attending private schools must meet the requirements of Section 141(a)(3)(A) and (B) of Title I

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[388] Section 141(a)(2) of Title I, (20 U.S.C. 241e(a)(2)).

(20 U.S.C. 241e(a)(3)(A) and (B)) which generally provide that the LEA must provide satisfactory assurance that the control of funds provided under Title I and title to property derived from Title I must be in a public agency and that the public agency must administer such funds and property and that Title I funds must be used to supplement and not supplant funds from non-Federal sources.

Prior to the Education Amendments of 1974, the Title I statute provided that no LEA was to receive its Title I grant unless it provided for the participation of eligible children attending private schools. Since this requirement proved difficult to enforce,[389] Congress adopted a so-called "by-pass" provision.[390]

It has been suggested [391] that the enactment of the "by-pass" provision was motivated by the continuing existence of state statutes which restricted the use of Title I funds for educationally deprived private school children despite statutory language indicating that such restrictions might result in withdrawal of Title I funding. The "by-pass" provision allows the Commissioner to by-pass any LEA and make arrangements for the provision of services to eligible private school children. Thus, it ensures that private school children eligible for Title I assistance will receive that assistance.

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[389] H.R. No. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4109.

[390] Section 141A(b) of Title I (20 U.S.C. 241e-1(b)), as added by Section 101(a)(6) of the Education Amendments of 1974 (P.L. 93-380). This provision is described in more detail *infra* at p. 245 .

[391] Levin, *Between Scylla and Charybdis: Title I's Comparable Services' Requirement and State and Federal Establishment Clauses*, Duke L.J. 39(1976).

II. General Regulatory Overview

Applicable policies pertaining to private school participants are generally found in §116a.23 of the revised regulations, although specific references to private school children are also found, for example, in the needs assessment, program design and parent involvement sections. The discussion that follows describes the major requirements, prohibitions, and restrictions in the regulations which pertain to the participation in Title I of educationally deprived children enrolled in private schools.

III. School Attendance Area Eligibility and Targeting Provisions

The old regulations[392] provided that special educational services must be provided to: "those educationally deprived children who reside in the public school attendance area designated as the project area or in a geographical area reasonably coterminous with the project area." (emphasis added)

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[392] 45 C.F.R. §116.19(a)(1974).

Although the phrase "a geographical area reasonably coterminous with the project area" had been retained in the proposed regulations, commentors stated that it was ambiguous and should be clarified or deleted. Consequently, the revised regulations delete the phrase. The comments [393] indicate that the phrase was "intended to apply primarily to Title I programs being conducted at private schools which serve children, nearly all of whom are from the project area but with a few children residing just outside the project area...". The comments [394] also indicate that educationally deprived children attending private schools who do not reside in project areas may be included in Title I projects only if the conditions set forth in §116a.22(b)(9) [395] are satisfied. The primary conditions included in §116a.22(b)(9) are that participation of private school children will not impair the effectiveness of the Title I program and will not result in any extra cost. [396]

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[393] Comment 5 to §116a.23, 41 FR 42899 (September 28, 1976).

[394] Id.

[395] These conditions are more fully described supra, in the Child Eligibility Chapter.

If an educationally deprived child is enrolled in a private school located in another school district, the regulations [397] provide that the LEA "may make arrangements for such children with the [LEA] serving such other school district, including where appropriate, the making of a joint project application."

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[396] The revised regulations do not expressly address the procedures LEAs must use for counting eligible children enrolled in private schools where there are not well-defined school attendance areas. As discussed supra, (see School Attendance Area Eligibility and Targeting chapter) one consequence of desegregation may be the blurring of attendance area lines. Program Guide 64 (now cancelled by the final publication of the revised regulations) addressed this problem of no well-defined attendance areas and authorized the use of enrollment data in such situations to determine eligible schools. The guide then stated that the use of enrollment data to determine eligible schools "does not preclude the participation of preschool or private school children, who will or could attend that school. " No further guidance was given in Program Guide 64. However, a 1971 OE Handbook (OE 72-62) on Participation of Private School Children in Title I (Private School Handbook) cited the sentence from Program Guide 64 quoted supra, and then acknowledged that the problem involves determining which private school enrollees will or could attend the targeted public schools. The Private School Handbook suggested that "[i]in most cases the LEA will have a set of criteria for determining the enrollment of a particular public school. In close consultation with private school representatives, these criteria should be applied to the private school enrollment as a potential public school enrollment. Such an application should result in the identification of the private school children who 'will or could' attend a given public school."

[397] 45 C.F.R. §116a.23(a)(1976).

IV. Eligibility and Targeting of Children Provisions

The above discussion concerned the applicability of the school attendance area eligibility and targeting provisions to children attending private schools. This subsection concerns the standards for determining which children residing in project areas and attending private schools should receive special assistance under Title I.

As explained supra, any child who is educationally deprived, as defined in the federal regulations, and who resides in a project area and attends a private school is eligible for consideration as a Title I program participant.

However, as in the case of children attending public schools, this does not mean that every eligible private school child will receive Title I services. The regulations [398] indicate that the LEA's application must contain sufficient information to enable the SEA to determine that, with respect to private school children, the LEA has complied with §116a.21 which includes the "most in need" requirement.

V. Needs Assessment

The LEA's assessment of the special educational needs of educationally deprived children residing in the school district must include the needs of children residing in the public school attendance areas who are enrolled in private schools.

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[398] 45 C.F.R. §116a.23(d)(1976).

The regulations[399] set out the needs assessment requirement in some detail. The regulations specify that

> 1) the LEA must determine the incidence and severity of educational deprivation among children enrolled in private schools [400] and
>
> 2) in making the determinations required in the needs assessment process the LEA has "to the extent feasible, consulted with teachers, parents, and persons knowledgeable of the needs of private and public school children...". [401]

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[399] 45 C.F.R. §116a.21(1976). Under both the old and revised regulations, the needs of and services to be provided to eligible educationally deprived children enrolled in private schools must be determined on a basis comparable to that used in determining the same items for children in public schools. (See *infra* under Private School Comparability Requirement).

[400] 45 C.F.R. §116a.21(a)(1976).

[401] 45 C.F.R. §116a.21(g)(1976). The comments indicate that the LEA deliberately has been given flexibility under §116a.21(g) to determine the appropriate persons to consult concerning the needs of eligible private school children. The persons consulted need not be private school officials. Comment 6 to §116a.23, 41 FR 42899 (September 28, 1976).

The section in the regulations [402] expressly pertaining to the participation of private school children in Title I includes provisions recognizing that consultation with persons knowledgeable of the needs of private school children is necessary in the needs assessment process.

> The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program, and the types of special educational services to be provided for them shall be determined, after consultation with persons knowledgeable of the needs of these private school children... (emphasis added).

It is important to emphasize, however, that under the Title I legislation the LEA has ultimate control and responsibility for designing programs in which private school children will participate. The U.S. Supreme Court, in Wheeler v. Barrera [403] explained that:

> ...the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests... [t]he Act...does not give the private school a veto power over the program selected by the local agency.

VI. Private School "Comparability" Requirement

The revised regulations [404] have retained the language of the old regulations in providing that the needs of educationally deprived children enrolled in private schools, the number of such children and the types of special educational services to be provided for them must be determined, "on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools." In Wheeler v. Barrera, 417 U.S. 407 (1974), the Supreme Court considered a suit brought on behalf of Missouri parochial school students eligible for Title I assistance which alleged that they had not been provided programs comparable to those provided to public school children. The issue raised concerned "the scope of the state's duty to insure that a program submitted by a local agency under Title I provides 'comparable' services for eligible private school children." [405]

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[402] 45 C.F.R. §116a.23(b)(1976).

[403] Wheeler v. Barrera, 417 U.S. 402, 424 (1974).

[404] 45 C.F.R. §116a.23(b)(1976). 45 C.F.R. §116.19(b)(1974).

The court stated [406] that the comparability requirement does not mean that identical services must be provided to educa-

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These sections pertaining to the provision of services to children enrolled in private schools should be distinguished from the comparability requirement contained in 45 C.F.R. §116.26(1976) which generally concerns the provision of equal services with state and local funds between project and nonproject area schools. The latter "comparability" requirement does not apply to private schools.

[405] Wheeler v. Barrera, 417 U.S. 407, 408 (1974).

[406] Id at 420.

tionally deprived children enrolled in public and private schools.[407] In finding that the state was not obligated to provide the identical on-the-premises Title I instruction in nonpublic schools as in public schools, the court explained:[408]

> Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different from those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area... Title I was not intended to override these individualized state restrictions. Rather, there was a clear intention that the assistance programs be designed on local levels so as to accomodate the restrictions.

The revised regulations[409] incorporate the Supreme Court's interpretation of the comparability requirement in *Wheeler*.

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[407] The Supreme Court referred to page 6 of the *Private School Handbook* for support of the above principle. The *Handbook* provided, in relevant part, that:

> Basically, what the regulations and guidelines are saying is this: When a group of children in a private school are found to have a need which is similar (not identical) to a need found in a group of public school children, the response to that need with Title I resources should be similar (not identical) in scope, quality, and opportunity for participation for both groups.

[408] 417 U.S. at 421.

[409] 45 C.F.R. §116a.23(c)(1976). The language in the revised regulations was also derived from old OE guidelines which recognized that the needs of private school children residing in eligible school attendance areas may differ from those of public school children residing in the same areas. Consequently, different, *although comparable*, services may be required." 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which

Specifically, the regulations provide that:

> ...consistent with the principles set forth in §116a.22 of this subpart [pertaining to program design and sufficient, size, scope and quality] those services and activities must be comparable in quality, scope and opportunity for participation to those provided to public school children with needs of equally high priority. [emphasis added]

Old OE program guides [410] explained that certain LEA arrangements for private school children would not satisfy the comparability requirement: the provision of Title I services at inconvenient hours or inconvenient locations, e.g. equating a trip to the zoo for private school students with an extensive remedial instruction program available only to public school children; expending one dollar for an educationally deprived child in a private school as compared to ten dollars for an educationally deprived child in a public school.

VII. Program Design

The responsibility for designing specific Title I programs and projects for private school children is to be exercised by the LEA in consultation with persons knowledgeable of the needs

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in turn should produce an equitable sharing of Title I resources by both groups of children" Program Guide No. 44, Section 4.5.

[410] These examples are contained in Program Guide No. 24, Section 10.

of those children (see above). However, the statute [411] and the regulations [412] include a list of acceptable arrangements through which Title I programs and services can be made available to private school children: "dual enrollment, educational radio and television, and mobile educational services and equipment."

The regulations [413] also suggest special services that Title I could provide, i.e., "therapeutic, remedial or welfare services, broadened health services, school breakfast for poor children, and guidance and counseling services,"

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[411] Section 141A(a) of Title I, (20 U.S.C. 241e-1(a)).

[412] 45 C.F.R. §116a.23(a)(1976).

[413] 45 C.F.R. §116a.23(f)(1976). The comments indicate that these specific examples were retained despite criticism by several commentors because they are found in the statute and legislative history. Comment 3 to §116a.23, 41 FR 42899 (September 28, 1976).The Supreme Court has on several occasions explained the circumstances under which publicly funded services may constitutionally be provided to nonpublic school children. The policies set forth in these decisions are particularly important in terms of Title I which requires that comparable services be made available for eligible public and private school children. The Supreme Court's decisions have focused on the potentiality that such aid would be utilized for sectarian purposes, i.e., for the purpose of advancing religion.

In Lemon v. Kurtzman, 413 U.S. 602, 612-3 (1971), the Supreme Court enunciated a test for determining whether a challenged state statute is violative of the First Amendment prohibition against laws "respecting an establishment of religion." A statute, to be upheld,

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must (a) reflect a clearly secular legislative purpose, (b) have a primary effect that neither advances nor inhibits religion, and (c) avoids excessive government entanglement with religion. Using this test in a recent decision, Wolman v. Walter, 45 U.S.L.W. 4861 (1977), the Court considered the constitutionality of portions of the Ohio statute which concerned aid to nonpublic schools. The Court upheld as constitutional Ohio's policy of

1) loaning secular textbooks used in public schools to private school pupils or their parents upon request;

2) permitting the use by private school pupils of standardized tests and scoring services (as opposed to teacher-prepared tests) which are used in the public schools;

3) providing on-the-premises speech, hearing and psychological diagnostic services to private school students;

4) providing on-the-premises physician, nursing, dental and optometric services to private school students;

5) providing remedial, guidance and therapeutic services to private school students in religiously neutral locales.

However, the Court held as unconstitutional certain provisions in the Ohio statute which would, they determined, have the primary effect of directly advancing the sectarian enterprise:

1) loaning private school students or their parents ostensibly secular instructional materials and equipment (projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts) used in public schools;

2) providing field trip transportation to private school students where the frequency and choice of destination resides in the private school teacher.

The programs and projects under Title I, which may include the arrangements described above, must satisfy certain minimum requirements, the most important of which are set forth below.

> (a) The Title I project must furnish special educational services that meet the special educational needs of educationally deprived children rather than the needs of the student body at large or children of a specified grade. 414/
>
> (b) The equipment in private schools, acquired with Title I funds must be used only for Title I purposes, i.e., it must not "inure to the benefit of any private school." 415/ Furthermore, the LEA must:
>
> > assure itself that the equipment is being used solely for the purposes of the project, and remove the equipment from the private school premises when necessary to avoid its being used for other purposes or when it is no longer needed for the purposes of the project. 416/
>
> (c) In any project where students enrolled in private schools participate along with students attending public schools, the LEA "shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children." 417/
>
> (d) All services provided with Title I funds must always remain under the administrative direction and control of a public agency i.e., Title I services may not be administered by the private school. 418/

414/ 45 C.F.R. §116a.23(d)(1976).

415/ 45 C.F.R. §116.42(a)(1976).

416/ 45 C.F.R. §116.42(b)(1976). See generally 45 C.F.R. §100b.215(d)(1)-(3)(1976).

417/ 45 C.F.R. §116a.23(e)(1976).

418/ 45 C.F.R. §116.42 and §116a.23(f)(1976).

VIII. PACs and Private School Participation

The PAC provisions in the regulations reflect recent statutory amendments (see the Parent Involvement Chapter for full discussion of PACs), continuing the basic Title I requirement that parents of private school children be given the opportunity to participate in a PAC. Specifically, the Title I regulations [419] require that each parent advisory council have

> as a majority of its members, (A) parents of children (including parents of private school children) who are currently participating in the program or (B) parents of children who will participate in the projects proposed for the following fiscal year, if satisfactory data is available to identify such children.

Under the regulations [420] PAC members are selected by "all of the parents of children eligible to attend a public school serving a project area, including parents of children living in such area and enrolled in private schools...".

IX. Evaluation of Private School Participants In Title I

The revised regulations require that the LEA evaluation plan include those Title I participants who are enrolled in private schools. Specifically the provision [421] states that the "evaluation of programs and projects shall, consistent with the nature and extent of participation of children enrolled in private schools, be extended to such participation."

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[419] 45 C.F.R. §116a.25(a)(1)(i)(1976).

[420] 45 C.F.R. §116a.25(b)(1976).

X. The By-Pass Provision

Prior to the Education Amendments of 1974, the Title I statute provided that no LEA was to receive its Title I grant unless it provided for the participation of eligible children attending private schools. Since this requirement proved difficult to enforce, [422] Congress adopted a so-called "by-pass" provision. [423]

In accordance with the 1974 amendments to Title I, [424] the Commissioner is required to by-pass any LEA and personally make arrangements for the provision of services to educationally deprived children enrolled in private schools (a) upon his determination that the LEA "has substantially failed" to involve eligible private school children in its Title I programs "on an equitable basis" with eligible public school children or (b) when a LEA is prohibited by law from providing for the participatiopn of private school children in special programs. In circumstances under which the by-pass provision is utilized, the Commissioner must design Title I programs which satisfy the requirements contained in Section 141A(a) of Title I (20 U.S.C. 241e-1(a)), which are described supra. Separate programs provided by the Commissioner will be paid for out of the LEA's allocation of Title I funds.[425]

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[421] 45 C.F.R. §116.43(c)(1976).

[422] H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4109.

[423] Section 141A(b) of Title I, (20 U.S.C. 241e-1(b)), as added by Section 101(a)(6) of the Education Amendments of 1974 (P.L. 93-380).

[424] *Id.*

Before invoking the by-pass provisions, the Commissioner must provide the SEA and LEA 60 days notice of his proposed action and an opportunity for a hearing.[426]

The revised regulations implement this statutory addition at §116a.23-1 entitled "Waiver of requirements for participation by children enrolled in private schools." First, the section[427] prohibits a SEA from approving a Title I application that does not provide for the participation by private school children "unless and until" such requirement is waived and the Commissioner has made "satisfactory arrangements" for the provision of such services under this section. The SEA has the responsibility to notify the Commissioner that an application has been disapproved because it did not meet the private school student participation requirements. This report must include supporting evidence for such disapproval.

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[425] Section 141A(b)(3) of Title I (20 U.S.C. 241e-1(b)(3)).

[426] Section 141A(b)(4)(A) of Title I, (20 U.S.C. 241e-1(b)(4)(A)).

[427] 45 C.F.R. §116a.23-1(a)(1976).

Second, the Commissioner is authorized to waive the requirement that LEAs provide for the participation of private school students in a Title I project and provide for such participation himself under two circumstances:

> (1) if a LEA is prohibited by law from providing for [such] participation [428]
>
> (2) if the Commissioner determines that a LEA has 'substantially failed to provide for the participation, on an equitable basis,' of [eligible private school children] (as set forth in an approved application) [429]

In determining whether a LEA is prohibited by law from providing the required services to private school children, the Commissioner may require that the SEA furnish an opinion of the State's Attorney General. [430]

Where the Commissioner determines that an LEA has "substantially failed" to fulfill its obligation to provide for private school student participation in its Title I application "he shall make arrangements for the appropriate provision of services to such children." [431] At such point the appropriate provisions will be considered to have been waived.

Third, the revised regulations [432] provide where an LEA, pursuant to an approved application initially undertakes to provide for the equitable participation of children enrolled in private schools but

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[428] 45 C.F.R. §116a.23-1(b)(1976).

[429] 45 C.F.R. §116a.23-1(c)(1976).

[430] 45 C.F.R. §116a.23-1(b)(1976).

[431] 45 C.F.R. §116a.23-1(c)(1)(1976).

[432] 45 C.F.R. §116a.23-1(c)(2)(1976).

> thereafter reduces the size, scope, or quality of the services provided such children prior to (i) a final determination by the Commissioner to waive such requirement and (ii) the implementation of satisfactory arrangements for the provision of such services by the Commissioner under this section, no obligations or expenditures incurred by such agency may be recognized as allowable under Title I for the period during which such reduction of services takes place.

Fourth, the services that the Commissioner provides under the "by-pass provision" are paid for from the Title I allocation of the affected LEA "after consultation with the appropriate public and private school officials."[433] Fifth, the regulations[434] also state that the Commissioner has the discretion to proportionately decrease the amount of the SEA's administrative funds.

Finally, the regulations[435] provide that the Commissioner may not take any action under this section "until he has afforded the [SEA] and [LEA] affected by such action at least sixty days notice of his proposed action and an opportunity for a hearing with respect thereto on the record."

In addition, the sub-section[436] provides that if a SEA or LEA is disatisfied with the Commissioner's final action after a hearing it "may, within sixty days after notice of such action, file, with the United States Court of Appeals for the circuit in which such State is located, a petition for review" of the Commissioner's action as authorized by §141A(b)(4) of Title I.

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[433] 45 C.F.R. §116a.23-1(d)(1976). The comments indicate that officials of the SEA would be among the persons the Commissioner would consult before paying for such services. Comment 3 to §116a.23-1, 41 FR 42900 (September 28, 1976).

[434] 45 C.F.R. §116a.23-1(d)(1976).

[435] 45 C.F.R. §116a.23-1(e)(1)(1976).

[436] 45 C.F.R. §116a.23-1(e)(2)(1976).

Part III

ADMINISTRATIVE FUNCTIONS STATE EDUCATIONAL AGENCIES PERFORM UNDER TITLE I

ADMINISTRATIVE FUNCTIONS STATE EDUCATIONAL AGENCIES PERFORM UNDER TITLE I

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Part III

INTRODUCTION AND OVERVIEW

Part III

Administrative Functions State Educational Agencies Perform Under Title I

Introduction and Overview

The Title I legal framework provides that the State Educational Agency (SEA) must perform certain administrative functions to assure among other things, that Title I projects and programs are designed to meet the special educational needs of educationally deprived children and that Title I funds are focused on these children.

The purpose of this section of the paper is to describe the most important administrative functions SEAs are required to perform as generally contained in Section 142 of Title I (20 U.S.C. 241f), Section 434 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232c), Subpart B of Part 116 of Title 45 of the Code of Federal Regulations (C.F.R.) and Subparts O, P, and Q of Part 100b of Title 45 of the Code of Federal Regulations, (C.F.R.).

The most important administrative functions performed by SEAs include: application approval, rulemaking, grant distribution, financial management, evaluation, technical assistance, monitoring, enforcement, reporting to the federal government and complaint resolution.

Chapter 18

APPLICATION APPROVAL

Chapter 18

Application Approval

Under the Title I legal framework the SEA is responsible for determining whether a project application submitted by a LEA complies with the program requirements under Title I as set forth in the Title I legislation and regulations.[437]

The Title I statute[438] provides, in relevant part, that each SEA must submit an application providing satisfactory assurance that

> payments...under [Title I] will be used only for programs and projects which have been approved by the State Educational agency pursuant to Section 141(a) and which meet the applicable requirements of that section... (emphasis added).

Section 141(a) of Title I (20 U.S.C. 241e(a)), provides, in relevant part, that a LEA may receive a grant under Title I "only upon application therefor approved by the appropriate State educational agency, upon its determination" that the LEA has complied with the requirements of Section 141(a) of Title I, consistent with the basic criteria established by the Commissioner (hereinafter referred to as ~~LEA pro~~gram requirements).[439]

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[437] *See generally* Section 141(a) of Title I, (20 U.S.C. 241e(a)), Subparts D and E of Part 116 and Subpart C of Part 116a of Title 45 of the *Code of Federal Regulations* (1976).

[438] Section 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)).

[439] The role of the SEA in approving LEA applications under Title I has been recognized in the legislative history of Title I. The Senate Report accompanying the original legislation in 1965 described this function as follows: "Under the terms of the legislation, the State agency... determines whether or not the programs and projects submitted by local school districts are designed to further the purposes of title I." S. Rep. No. 146, 89th Cong., 1st Sess. 1, reprinted in [1965] *U.S. Code and Adm. News* 1453. The legislative history of the Education Amendments of 1969

The most important LEA program requirements 440/ include: access to information, comparability, concentration, coordination, school attendance area and child eligibility, equitably provided, excess costs, general aid prohibitions, information dissemination, needs assessment, parental involvement, private school participation, program design, program evaluation, recordkeeping and reporting, supplanting, and targeting school attendance areas and children.

In addition to the above requirements concerning application approval, the regulations provide that

> (a) The SEA shall not approve an application unless it has determined that the application meets all of the applicable requirements of Title I and the regulations 441 /
>
> (b) The amount of the approved application may not exceed the amount of funds made available under Title I for the LEA 442/
>
> (c) The effective date of approved application is the "date on which the application was submitted in substantially approvable form" 443/
>
> (d) The effective date of an approved application cannot be earlier than (1) the first day on which the funds applied for are available for obligation, or (2) the effective date of the SEA's annual program plan 444/
>
> (e) The SEA shall not finally disapprove any application, in whole or in part, without first affording the applicant reasonable notice and an opportunity for a hearing

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stated, with respect to the SEA role in approving LEA applications under Title I, that "it is the duty of the State agency to inform local agencies about weaknesses in their applications and, ultimately, disapprove those which are not consistent with the purposes and intent of the law" S. Rep. No. 91-634, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. and Adm. News 2775.

440/ These LEA program requirements are described in detail, *supra*, Part II.

441/ 45 C.F.R. §116.5(a)(1976).

442/ *Id.*

443/ 45 C.F.R. §116.5(b)(1976). *See also* 45 C.F.R. §100b.35(1976).

444/ *Id.*

in accordance with §425 of GEPA 445/

(f) If the SEA finally disapproves an application, the applicant can appeal to the Commissioner in accordance with §425 of GEPA 446/

(g) The SEA must make available to the public, in the manner prescribed by §116.45, (1) the Title I application, (2) related documents referred to Parts 116a, 116b, 116c, and 116d of the regulations and (3) the evaluation and other reports referred to in such parts 447/

445/ 45 C.F.R. §116.5(c)(1976). The notice must include the reasons for the proposed disapproval. The hearing must be held within 30 days after SEA receives the request for a hearing. If the SEA decides not to rescind its final action, it must give written notice to the applicant of the reasons for disapproval and must indicate the right to appeal to the Commissioner within twenty days of receipt of the notice, Id. In addition, §425(a) of GEPA (20 U.S.C. 1231b-2(a)) provides, in part, that the applicant must be "aggrieved by the final action" of the SEA and must allege "a violation of State or Federal law, rules, regulations, or guidelines governing the applicable program" by the SEA in "disapproving or failing to approve [the] application or program in whole or part...". §425(a) also provides that the SEA hearing must be "a hearing on the record." The SEA must issue its written ruling no later than ten days after the hearing. If the SEA determines that its final action was contrary to Federal or State law, or the rules, regulations, and guidelines governing the program, then it must recind its final action.

446/ 45 C.F.R. §116.5(d) (1976). §425(b) of GEPA (20 U.S.C. 1231b-2 (b)) provides, in part, that notice of appeal must be filed with the Commissioner within twenty days after the SEA notifies the applicant of the results of the SEA review under §425(a). If, on appeal, the Commissioner determines that the SEA's final action was contrary to Federal law or the rules, regulations, and guidelines governing the Title I program, the Commissioner must order the SEA to take appropriate action. On such appeal, the SEA's findings of fact, if supported by substantial evidence, are final. The Commissioner may also issue interim orders to the SEA pending appeal or review.

447/ 45 C.F.R. §116.5(e) (1976). With respect to the manner in which such information must be made available to the public, this section of the regulations actually refers to §116.35, rather than §116.45. However, this appears to be a printing mistake because the subject of §116.35 is "Staffing for programs and projects" and the subject of §116.45 is "Public information." See pp. 221 - 225 for a discussion of parental and public access to information and the requirements of §116.45. Those seeking access to or copies of the application and related documents are not required to first request them from the LEA before requesting them from the SEA. Comment 2 to §116.5, 41 FR 42895 (September 28, 1976).

Chapter 19

Rule Making

Chapter 19

Rulemaking

I. Introduction

The Title I statute confers main responsibility for the administration of Title I on the SEAs. The regulations issued by OE recognize that part of those responsibilities include an important rulemaking function.[448] SEAs are authorized by the Title I regulations,[449] either expressly or by implication, to promulgate program requirements, not inconsistent with Title I requirements set forth in the statute and Title I regulations, which LEAs must meet in the areas of parent involvement, reporting to the SEA, and program development.

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[448] For purposes of this paper, the term "rulemaking" includes the issuance of SEA rules, procedures, regulations, clarifications, and guidelines pertaining to Title I.

[449] For example, Section 116a.25(g)(1)(1976) provides that members of parent advisory councils must be furnished copies of certain documents including "State Title I regulations and guidelines." This implies that the SEAs have the authority to issue regulations and guidelines pertaining to the Title I program within the State.

OE, in its 1973 handbook, Title I ESEA: How It Works, A Guide for Parents and Parent Advisory Councils (No. 73-07104), indicated that SEAs have the authority to issue rules and regulations for Title I. In defining the term "regulations," the publication stated, "States may also issue rules and procedures for title I, as long as they do not conflict with Federal regulations and law." This authority was reiterated by OE in a response to a LEA which had asked about the compatibility of SEA guidelines for selection of target areas with the Title I regulations. OE replied that Title I prohibited federal control over the administration of a school system within a state and that, "Accordingly, the Office of Education does not set limits on State guidelines, other than to see that Federal law is not contravened." (Emphasis added.)

OE had indicated that, in addition to a SEA having authority to issue rules and regulations for Title I, it should utilize that authority without excessive reliance on federal regulations and guidelines. In a report on SEA administration, the Commissioner critized a SEA for making "no attempt to develop State Regulations or guidelines as a means of providing

II. Parent Involvement

The Title I regulations[450] pertaining to parent participation include a provision which generally states that the SEA, at its discretion, may establish additional rules and procedures, not inconsistent with any Federal rules and procedures, "as may be reasonably necessary to insure the involvement of parents and the proper organization and functioning of parent advisory councils."

III. LEA Reporting Requirements

SEAs have the responsibility to set forth guidelines concerning what LEA information will be relevant to enable the SEA to properly administer the Title I program. Hence, the SEA can require an annual report and such other reports "in such form and containing such information, as may reasonably be necessary to enable the State Education Agency to perform its duties under Title I." [451]

IV. Program Development Requirements

In accordance with its application approval responsi-

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> technical assistance to [LEA] officials regarding educational needs, problems, and issues relevant to the State.

[450] 45 C.F.R. §116a.25(h)(1976).

[451] 45 C.F.R. §116.46(1976). *See* Section 141(a)(7) of Title I, (20 U.S.C. 241e(a)(7)). The information to be included

bility,[452] the Title I regulations[453] provide that the SEA shall not approve an application unless it determines, among other things, that the project described in the Title I application is of "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of [educationally deprived children]." In furtherance of their application approval responsibilities, SEAs may establish general standards for Title I proposals submitted by LEAs.[454]

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in the reports under this section of the regulations is described in detail supra, at pp. 226 - 227.

[452] The application approval responsibility of a SEA is described supra, in the chapter on Application Approval. Generally, this responsibility entails determining if a LEA's Title I application complies with the program requirements set forth in the Title I legislation and regulations. These program requirements are discussed in detail supra, in Part II.

[453] 45 C.F.R. §116a.22(b)(1976).

[454] OE correspondence and former OE program guides have indicated that SEAs have authority to establish standards for Title I proposals submitted by LEAs. In a letter to a Congressperson which concerned, among other things, SEA authority to establish and apply standards for application approval and concentration of Title I funds, OE stated that "...the prerogative of the State to set such requirements is upheld by the Title I Regulations which require that the [SEA] determine whether an application has 'sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children.' The SEA therefore has the authority to establish general standards for proposals and the responsibility to inform applicants that such standards will be applied." [Emphasis added.] The letter then concludes that the SEA may require that Title I funds be used at a particular grade level, for example K-6 or 7-12.

V. Restrictions On A SEA's Rulemaking Function

In exercising its rulemaking function, a SEA is restricted from assuming functions which reside in OE pursuant to the Title I regulations. States are authorized to supplement requirements set forth in the federal legal framework. However, states may not issue regulations which contravene existing federal policy.

For example, one SEA developed state guidelines for the reallocation of Title I funds. The guidelines contained criteria which would have governed the amount of funds allocated to LEAs and which were not consistent with the Commissioner's criteria for reallocation. An OE letter to the SEA indicated that although OE had

> supported the establishment of additional criteria on the part of a [SEA] which will contribute to assuring that Title I projects have sufficient size, scope and quality to give reasonable promise of meeting the special educational needs of educationally deprived children, that support cannot legally be extended to criteria which will determine the amount of the allocation to [LEAs].

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Program Guide No. 24, in discussing the nature and scope of state authority, stated that"...the [SEA] can establish criteria and disseminate them for guidance of [LEAs]"and that "the State agency may state that a particular practice or policy is 'desirable'; it may also advise [LEAs] of the specific or general criteria on which project proposals involving such a practice or policy will be evaluated, and it may apply such criteria in the approval of projects instead of letting such agencies decide for themselves. (ESEA Title I Program Guide No. 24, 8.1--cancelled Sept. 26, 1972). Program Guide No. 36 also suggested that the SEA could establish

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additional criteria for LEA proposals. It states that the SEA "will review each proposed project and determine whether it meets the Title I size, scope, and quality requirements in accordance with the foregoing criteria and such other criteria as the [SEA] may apply." (emphasis added) (ESEA Title I Program Guide No. 36 (April 14, 1967) was superseded by Program Guide No. 44 (March 18, 1968).

Chapter 20

GRANT DISTRIBUTION

Chapter 20
Grant Distribution

I. Introduction

One of the most important functions performed by SEAs under the Title I legal framework is the distribution of Title I monies. While the Commissioner is responsible for making payments to SEAs in the amount LEAs of that state are entitled to receive under Title I, the SEAs, in turn, have the responsibility for distributing Title I funds to those LEAs whose applications have been approved.

The first section in this chapter sets forth the general principles for the distribution of Title I funds. The second section explains formula changes included in the legal framework which are designed to deal with, among other things, the lack of full funding which has been a problem since the inception of the Title I program.

II. General Principles For Distribution of Title I Funds

The Title I legislation,[455] provides, in relevant part, that the Commissioner is authorized to make payments to SEAs for "grants made on the basis of entitlements created under this title." In this regard, the Commissioner has the express responsibility for determining LEA maximum grants [456] based on the number of children from low-income families residing in each school district "where satisfactory data...are available." (emphasis added) [457]

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[455] Section 102 of Title I (20 U.S.C. 241b).

[456] Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands are not included in the provisions concerning grant eligibility. 45 C.F.R. §116a.3(1976).

The Title I statute includes the proviso "where satisfactory data...are available" because low-income data are available for the entire nation only at the county level. Therefore, where the county and the school system's boundaries are coterminous, the entitlement is determined directly by the Commissioner using data from the Department of Commerce.[458] However, where the LEA's boundaries are not coterminous with the county's boundaries, the SEA is delegated the responsibility of allocating grants among the LEAs in the county. This process is referred to as the allocation of county aggregate grants by SEAs. [459]

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[457] Section 103(a)(2) of Title I (20 U.S.C. 241c(a)(2)). 45 C.F.R. §116a.3(a), (b)(1976). As explained *supra*, in the chapter on School District Eligibility there must be at least ten children in the school district of a LEA for a LEA to be eligible for a Title I grant.

The 1974 Amendments (P.L. 93-380) established the entitlement formula for LEA grants which now appears in §103(a)(2) of Title I: (1) the "state per pupil expenditure figure" is calculated by multiplying actual state per pupil expenditure by 40%, and the per pupil expenditure level for any state is limited to a range between 80% and 120% of the national average; (2) figure (1) is multiplied by the "children from low-income families" figure, which is determined by the "Orshansky index" (which adjusts the poverty level index of the census report according to family size and farm/non-farm location) and two-thirds of the children from families receiving AFDC payments; (3) this final figure results from multiplying (1) and (2). Because of weightings in the formula, more aid is provided to states with a high proportion of families below the "Orshansky index" of poverty, and less aid to urban areas where AFDC payments often put families above the "Orshansky index" than under the previous Title I formula.

[458] 45 C.F.R. §116a.5(a)(1976).

More specifically, the SEA must sub-allocate the county aggregate grants among eligible LEAs based on criteria prescribed by the Commissioner and set out in the Title I regulations. [460]

Under the regulations, [461] certain funds from the LEAs entitlement must first be sub-allocated among the county LEAs based on the proportion of children, aged 5 to 17, living in institutions for neglected or delinquent children. The remainder of the county grant is then allocated on the basis of the current distribution in the county of children, aged 5 to 17, from low-income families (using a poverty level selected by the SEA consistent with the purposes of Title I) as determined on the basis of the best available data.[462] Acceptable data include (1) 1970 census data on the number of children from low-income families and (2) AFDC data. Other types of data must be approved by the Commissioner before use by the SEA.[463]

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[459] Id.

[460] 45 C.F.R. §116a.5(1976).

[461] 45 C.F.R. §116.5(b)(1976). The regulations also provide that the number of such children shall be the number in the October caseload who have resided in the institution for at least 30 days. If a SEA determines that a LEA is "unable or unwilling to provide for the special educational needs of such children," then that portion of the LEA grant which is based on such children shall be assigned to the SEA if the SEA assumes that responsibility. If it does not, the SEA must designate another state or local public agency that is willing and able to assume the responsibility. If no such agency can be found, the SEA must deduct the amount from the LEA's allocation and must not reallocate it. (Id.) The comments to the regulations state, in part, "if such services are not provided, then the funds attributable to such children are not available for other purposes and revert to the U.S. Treasury." Comment 1 to §116a.5, 41 FR 42897 (September 28, 1976).

To the extent a school district is located in more than one county, the maximum grant for such LEA is the sum of its allocations from the aggregate grants of the counties in which the LEA is located.[464] In cases in which two or more LEAs have responsibility for different groups of children in a district, or serve school districts which overlap, the SEA may allocate the maximum grants among such LEAs "in such manner as it determines will best carry out the purposes for which the grants under Title I are made available."[465]

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[462] 45 C.F.R. §116a.5(c)(1976).

[463] Id.

[464] 45 C.F.R. §116a.6(1976).

[465] 45 C.F.R. §116a.7(1976).

The regulations [466] also provide that, if LEAs merge or consolidate during the school year, the surviving or consolidated LEA shall receive the grant for which each LEA was eligible and shall be responsible for previously approved projects which were not completed in each LEA. Furthermore, if there is a change in a LEA's service area because such area is diminished or divided with another LEA, then the SEA must redetermine the grants by using the same method used in the original determination.[467]

III. Specific Application of the General Provisions

A. Introduction

Once state entitlements are determined, the Commissioner must pay each state the amount which it is eligible to receive under Title I.[468]

From the funds paid to it under the above paragraphs, each SEA then distributes to each eligible LEA of the state, which has submitted an application approved by the SEA, the amount for which such application has been approved not to exceed the amount of the LEA's entitlement.[469]

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[466] 45 C.F.R. §116a.8(a)(1976).

[467] 45 C.F.R. §116a.8(b). This provision does not preclude "the completion, where appropriate, of previously approved projects by the agency originally submitting the projects by itself or through a cooperative undertaking." Id.

[468] Section 143(a)(1) of Title I (20 U.S.C. 241g(a)(1)). 45 C.F.R. §116.17(1976).

B. Ratable Reductions

Where the sums appropriated by Congress are not sufficient to meet the total state entitlements as determined by the Commissioner, the amounts which states are eligible to receive are determined by ratable reduction to the extent necessary.[470] However, no payments may be made to a state which has taken into consideration payments under Title I in determining the eligibility of a LEA in that State for State aid. [471]

C. The 85 Percent Hold Harmless Provision

In addition to "ratable reduction," the Title I statute authorizes another modification in the grant distribution process, i.e., the "hold harmless provision." The statute [472] indicates that, where an LEA's ratably reduced allocation would be less than 85 percent of its allocation for the preceding fiscal year, that LEA must have its allocation raised to the 85 percent "floor" by reducing the allocation of the remaining LEAs.

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[469] Section 143(a)(2) of Title I (20 U.S.C. 241g(a)(2)). *See* 45 C.F.R. §116.5(a)(1976).

[470] Section 144 of Title I (20 U.S.C. 241h), which provides, in relevant part, "if the remainder of such sums available.. is not sufficient to pay in full the total amounts which all local educational agencies are entitled to receive under part A of this title for such year, the allocations to such agencies and allocations under part B shall...be ratably reduced to the extent necessary to bring the aggregate of such allocations within the limits of the amount so appropriated"...[Emphasis added.]; 45 C.F.R. §116a.9(1976).

[471] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1); 45 C.F.R. §116.18(1976).

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[472] Section 144 of Title I (20 U.S.C. 241h), states "the allocation of a local educational agency which would be reduced under the preceding sentence to less than 85 per centum of its allocation under part A for the preceding fiscal year, shall be increased to such amount, the total of the increases thereby required being derived by proportionately reducing the allocations of the remaining local educational agencies, under the preceding sentence, but with such adjustments as may be necessary to prevent the allocation to any remaining local educational agency from being thereby reduced to less than 85 per centum of its allocation for such year."

Section 101(a)(10) of P.L. 93-380, the so-called "Bayh Amendment" authorizes monies to be distributed by the Commissioner at his discretion to local educational agencies whose allocations under part A of Title I are 90 percent or less than such allocations in the previous fiscal year. This statutory amendment is implemented by §116a.10 of the regulations. That section generally provides that in allocating monies appropriated under this section, the Commissioner will consider the amount that the appropriate local educational agencies would have received if not for the operation of the 85 percent guarantee provision of section 144 of the Act described above.

D. Reallocation

In addition to this initial grant distribution, the SEA is responsible for reallocating unused Title I funds. [473] Each SEA must determine, not earlier than March 31st of a fiscal year, the amounts allocated to LEAs in excess of the amounts required for approved programs and projects and must certify such amounts to the Commissioner. [474]

The reallocation of such funds must be made to those LEAs "which apply for additional funds and which have the greatest needs to redress inequities inherent in, or mitigating hardships caused by "the Title I funding formula."[475] The needs of such LEAs and the amounts for which they are eligible are determined on the basis of the extent to which the SEA determines that the funding formula fails," as a result of population shifts, changing economic conditions, or other reasons, to reflect actual needs." [476]

If there are still excess amounts available after this initial SEA reallocation, then the Commissioner is authorized, on the basis of his determination of need, to reallocate these excess amounts to LEAs in other states, the District of Columbia, or Puerto Rico which have the greatest need. However, the total amount made available may not exceed the maximum grant authorized.[477]

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[473] Section 144 of Title I (20 U.S.C. 241h); 45 C.F.R. §116a.11(1976).

[474] 45 C.F.R. §116a.11(a)(1)(1976).

[475] 45 C.F.R. §116a.11(a)(2).

[476] Id. See 45 C.F.R. §116a.11(a)(3).

[477] 45 C.F.R. §116a.11(a)(3).

The maximum grant, including reallocations, which a LEA is eligible to receive is the grant which the LEA would have received but for ratable reductions. 478/

E. Carry Over of Title I funds

In accordance with Section 412(b) of GEPA (20 U.S.C. 1225(b)) LEAs may carry over Title I funds not obligated to the succeeding fiscal year, i.e., any funds appropriated under Title I during any fiscal year, which are not obligated and expended by a LEA prior to the beginning of the fiscal year succeeding the fiscal year for which the funds were appropriated, will remain available for obligation and expenditure during the succeeding fiscal year.

478/ 45 C.F.R. §116a.11(a)(4)(1976).

Chapter 21

FINANCIAL MANAGEMENT

Chapter 21

Financial Management

I. Introduction

The SEAs' financial management "function" is a combination of several requirements imposed on SEAs to insure that Title I funds are used in a fiscally responsible manner to achieve the general purpose of Title I, i.e., to meet the special educational needs of educationally deprived children residing in low-income areas.

This chapter will focus on the three major requirements for financial management: (1) requirements pertaining to fiscal controls and fund accounting procedures, (2) requirements concerning audits, and (3) requirements pertaining to recordkeeping and fiscal reporting.

II. Fiscal Control and Fund Accounting Procedures

The Title I statute requires that state applications submitted to the Comissioner contain assurances concerning fiscal controls and fund accounting procedures. Specifically, the Title I statute [479] requires that any state desiring to participate in Title I must submit through the SEA an application to the

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[479] Section 142(a)(2) of Title I (20 U.S.C. 241f(a)(2)). Similar language appears in Section 434(b)(1)(A)(II) of GEPA (20 U.S.C. 1232c(b)(1)(A)(II)). The only exception to this requirement concerns programs for migratory children of migratory agricultural workers or fishermen under Section 122 of Title I (20 U.S.C. 241c-2). 45 C.F.R. §116.3(a)(1976).

Commissioner which provides "satisfactory assurance"

> that such fiscal control and fund and accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including such funds paid by the State to [LEAs]) under this title.

The Title I regulations [480] reinforce the "satisfactory assurance" requirement by requiring that any state interested in participating in Title I must include as part of its program plan assurances that, among other things, (a) payments under Title I will be used only for programs approved by the SEA, and (b) the SEA will comply with all of the provisions set forth in the Title I statute and regulations.

The GEPA regulations [481] prescribe specific standards that SEAs must follow with respect to all Federally supported activities. In part, the standards require that the financial management system of a SEA provide for

> (a) Accurate, current, and complete disclosure of the financial results [of grants and

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[480] 45 C.F.R. §116.3(a)(1)(1976). Other important assurances which must be included in the state as part of its program plan are discussed *infra*, in this chapter in the section on Requirements pertaining to recordkeeping and fiscal reporting.

[481] 45 C.F.R. §100b.300(1976). The regulations pertaining to the fiscal management of Title I programs, which orginally were contained in Part 116 of Title 45 of the Code of *Federal Regulations* have been incorporated and further expanded in Part 100b of Title 45 of the *Code of Federal Regulations*, which contain regulations issued pursuant to GEPA. The revocation of certain former Title I regulations related to financial management and their incorporation into GEPA regulations were described in a ESEA Title I Program Directive to State Title I Coordinators, Notice A1014 (December 6, 1973).

> subgrants] 482/
>
> (b) Effective control over and accountability for all grant or subgrant funds, and real and personal property acquired with grant or subgrant funds. Grantees and subgrantees shall adequately safeguard all such property and shall assure that it is used solely for authorized purposes. 483/
>
> (c) Comparison of actual with budgeted amounts for each grant or subgrant . . . 484/
>
> (d) Procedures to minimize the time elapsing between the transfer of funds from the U.S. Treasury and the disbursement by the State agency. . . 485/
>
> (e) Procedures for determining the allowability and allocability of costs in accordance with applicable cost principles prescribed by [the regulations.] 486/

The Title I statute 487/ also requires that a LEA application provide "satisfactory assurance" to the SEA that a public agency

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482/ 45 C.F.R. §100b.301(a)(1976).

483/ 45 C.F.R. §100b.301(c)(1976); See 45 C.F.R. §116.42(b)(1976).

484/ 45 C.F.R. §100b.301(d)(1976).

485/ 45 C.F.R. §100b.301(e)(1976).

486/ 45 C.F.R. §100b.301(f)(1976).

487/ Section 141(a)(3)(A) of Title I (20 U.S.C. 241e(a)(3)(A)). See 45 C.F.R. §116.42(1976). The GEPA regulations also contain a requirement that the SEA provide that all Title I funds are expended solely for Title I purposes. 45 C.F.R. §100b.257(1976). See also, Subpart L of Part 100b of the GEPA regulations, "Property Management Requirements."

will control and administer funds provided under Title I and property acquired with those funds to ensure their use for Title I purposes.

In addition, the GEPA regulations [488] establish criteria for determining when funds have been obligated.

> The regulations state that: an obligation of funds will be considered to have been incurred by a recipient on the basis of documentary evidence of binding commitments for the acquisition of goods or property, for the construction of facilities, or for the performance of work. However, the obligation of funds for personal services, for services performed by public utilities, for travel, and for the rental of equipment and facilities shall be considered to have been obligated as of the time such services were rendered, such travel was performed, and such rented equipment and facilities were used, respectively.

III. SEA Auditing Responsibility

The GEPA regulations [489] expressly require, among other things, audits of LEAs. The relevant provisions of these regulations specify the frequency and scope of the audits must be performed to ensure the fiscal integrity of Title I requirements. Specifically, the regulations provide for

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488/ 45 C.F.R. §100b.55(c)(1976).

489/ 45 C.F.R. §100b.301(h)(1976).

> audits to be made by the State agency or subgrantee or at its direction to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant. The grantee or subgrantee will schedule such audits with reasonable frequency, usually annually, but not less frequently than once every two years, considering the nature, size, and complexity of the activity. [emphasis added]

The GEPA regulations [490] also require that the state agency's financial management system provide for a "systematic method to assure timely and appropriate resolution of audit findings and recommendations." However, no provisions are included in the regulations which set forth specific standards or procedures to be used in conducting audits. [491]

IV. SEA Recordkeeping and Fiscal Reporting

A. Recordkeeping Requirements

Closely related to the requirements for SEA fiscal controls and fund accounting procedures are the requirements for SEA recordkeeping and fiscal reporting. The GEPA statute [492] contains a basic requirement that SEAs and LEAs keep

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[490] 45 C.F.R. §100b.301(i)(1976). Audit resolution procedures are discussed *infra* at pp. 313 - 317 because of their important relationship to enforcement.

[491] SEAs and LEAs have received more detailed information concerning audit standards and procedures from an original Title I publication, *Guidelines: Special Programs for Educationally Deprived Children*, which was in effect until February of 1972.

> such records as the Assistant Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such funds are given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit. [Emphasis added.]

The GEPA regulations [493] expand on this recordkeeping requirement and state that such "records shall contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income." In addition, the GEPA regulations [494] require "accounting records" and related supporting documents.

To fulfill their recordkeeping obligation, SEAs and LEAs are also required under the GEPA statute, [495] to keep such records as "will facilitate an effective audit." The Secretary and the U.S. Comptroller General or any of their representatives must be given access to "any books, documents, papers, and records" which are deemed relevant or pertinent "for the purpose of audit and examination." [496]

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[492] Section 434(a)(1) of GEPA (20 U.S.C. 1232c(a)(1)). Federal access to such records for examination and audit is required by §434(a)(2) of GEPA (20 U.S.C. 1232c(a)(2)); 45 C.F.R. 100b.477(e)

[493] 45 C.F.R. §100b.301(b)(1976). *See* 45 C.F.R. §116.3(a)(2) (1976).

[494] 45 C.F.R. §100b.301(g)(1976).

[495] Section 434(a)(1) of GEPA (20 U.S.C. 1232c(a)(1)).

With respect to the retention of records relating to the receipt and expenditure of Federal funds, the GEPA statute and regulations require that all such records be kept "intact and accessible" [497] until five years after the completion of the Title I project [498] or, with respect to records deemed relevant to an HEW audit, until the resolution of that audit. [499]

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[496] Section 434(a)(2) of GEPA (20 U.S.C. 1232c(a)(2)); 45 C.F.R. §100b.477(e)(1976).

[497] 45 C.F.R. §100b.477(a)(1976).

[498] Section 434(a)(2) of GEPA (20 U.S.C. 1232c(a)(2)). 45 C.F.R. §100b.477(b)(1976) provides that the record retention period shall be three years after the date of submission of the LEA's annual expenditure report to the SEA. Inconsistencies between the GEPA statute and GEPA regulations are resolved in favor of the statute. Thus, "five years after completion of the Title I project" is the applicable record retention period for all records referred to in the GEPA statute and regulations.

[499] Section 434(a)(2) of GEPA (20 U.S.C. 1232c(a)(2)); 45 C.F.R. §100b.477(d)(1976).

B. Fiscal Reporting Requirements

With respect to SEA fiscal reporting requirements, the Title I statute [500] requires that a state application must contain a "satisfactory assurance" that the SEA will provide the Commissioner

> (a) periodic reports evaluating the effectiveness of payments under this title and of particular programs assisted under it...and
>
> (b) such other reports as may be reasonably necessary to enable the Commissioner to perform his duties under this title...

The same statutory provision [501] requires that the state application provide "satisfactory assurance" that it will afford access to records "the Commissioner may find necessary to assure the correctness and verification of...reports [provided him by the SEA]."

The GEPA regulations governing financial reporting prescribe, in part, standard forms for SEA financial reporting, including forms for a financial status report [502] and a report of federal cash transactions. [503]

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[500] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)). Similar language appears in Section 434(b)(1)(A)(III) of GEPA (20 U.S.C. 1232c(b)(1)(A)(III).

[501] The Title I statute also requires that a SEA must determine from a review of a LEA application that the LEA ". . . will keep such records and afford such access thereto as the [SEA] may find necessary to assure the correctness and verification of such reports." Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)).

[502] 45 C.F.R. §100b.403(a)(1976). See ESEA Title I Program Directive Inst. A310-3 (December 4, 1975).

[503] 45 C.F.R. §100b.404(a)(1976). In addition to these financial reports, the Commissioner requires the SEA to submit an annual report concerning the distribution of Title I funds among the participating agencies within a state. (ESEA Title I Program Directive Inst. A310.1 (November 27, 1972).)

Chapter 22

SEA EVALUATION

Chapter 22

SEA Evaluation

Under the terms of the Title I legislation[504] and regulations[505] the LEA is responsible for evaluating, at least annually, the effectiveness of Title I programs in meeting the special educational needs of educationally deprived children.

A similar requirement for SEAs is contained in the legislation[506] and regulations.[507] In accordance with the Education Amendments of 1974 (P.L. 93-380), the states are required to carry out their evaluation responsibilities in accordance with procedures and criteria developed by OE. OE's role with respect to helping SEAs fulfill their evaluation function is described in Section 151 of Title I.[508] Specifically, the Commissioner must,

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[504] Section 141(a)(6) of Title I (20 U.S.C. 241e(a)(6)). The evaluation responsibilities of LEAs are described supra, on pp. 133 - 138.

[505] 45 C.F.R. §116.43(1976).

[506] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)).

[507] 45 C.F.R. §116.7(a)(1976).

[508] A more complete description of OE's role in the Title I evaluation process is described infra, on pp. 309 - 311.

> (a) provide SEAs with models for evaluations of all Title I programs "for their use in carrying out their functions...which shall include uniform procedures and criteria to be utilized...by the State agency in the evaluation of such programs." 509/
>
> (b) develop models which specify "objective criteria which shall be utilized in the evaluation of all programs and shall outline techniques (such as longitudinal studies of children involved in such programs) and methodology (such as the use of tests which yield comparable results) for producing data which are comparable on a statewide and nationwide basis." 510/
>
> (c) consult with SEAs (where appropriate) "in order to provide for jointly sponsored objective evaluation studies of programs and projects assisted under this title within a State."511/

Evaluation models are still being developed; thus, the current regulations do not reflect the requirements set forth above. However, both the Title I statute and regulations impose certain other evaluation-related requirements upon SEAs.

The SEA must submit an annual evaluation report to the Commissioner following the close of each fiscal year and no later than November 15th of the next fiscal year. 512/ These reports must evaluate "the effectiveness of programs and projects under Title I in meeting the special educational needs

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509/ Section 151(d) of Title I (20 U.S.C. 241o(d)).

510/ Section 151(f) of Title I (20 U.S.C. 241o(f)).

511/ Section 151(c) of Title I (20 U.S.C. 241o(c)).

512/ 45 C.F.R. §116.7(a)(1976).

of participating children...".[513] The statute [514] explains that such reports must include, among other things, the "results of objective measurements required by [the LEA evaluation requirements contained in Section 141(a)(6) of Title I]... and of research and replication studies."

The regulations [515] further provide that, in addition to the required annual evaluation report, the SEA must submit evaluation reports for two LEAs applying for Title I funds, including one LEA "whose allocation for funds under Title I... for the current fiscal year is among the five highest in the State."

The legislative history accompanying the Education Amendments of 1974 (P.L. 93-380) described the requirements and purposes of the law regarding evaluation reports: "The present law requires local school districts to conduct annual evaluations of their Title I programs and to report the results of these evaluations to the State educational agencies. The States in turn must submit periodic reports (including the results of the local evaluations) to OE. The purposes of those requirements are: to enable each local educational agency to assess the effect of its program and to identify weaknesses as well as strengths of the project, thus serving as a tool for program revision and improvement; to enable each State to determine the extent to which progress has been made in reaching State goals for meeting the needs of educationally deprived children, as well as to provide a tool for State planning, management, and dissemination; and to enable the Commissioner of Education to conduct a similar analysis at the national level." 516/

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[513] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)); 45 C.F.R. §116.7(a)(1976). The comments to the revised regulations state that "the evaluation report, as always, covers the usual period of a Title I program, the period from the beginning of the preceding regular school term through the end of summer following that term and, therefore, is not affected by the change in [the Federal] fiscal year." Comment 1 to §116.7, 41 FR 42895 (September 23, 1976).

[514] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)).

[515] 45 C.F.R. §116.7(a)(1976).

516/ H.R. Rep. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4111.

Chapter 23

TECHNICAL ASSISTANCE

Chapter 23

SEA Technical Assistance to LEAs

The Title I statute [517] specifically requires that OE assist SEAs by providing them with technical and other assistance to enable them to assist LEAs "in the development and application of a systematic evaluation of programs in accordance with the [evaluation] models developed by the Commissioner."

The SEA responsibility to provide technical assistance to LEAs is set forth in the Title I regulations. Specifically the regulations [518] provide, in part, that the SEA "shall be responsible for...the provision of technical assistance to local and State agencies with respect to the measurements and evaluations such agencies are required to submit" pursuant to Title I.

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[517] Section 151(e) of Title I (20 U.S.C. 241o(e)). The OE evaluation models to which Section 151(e) refers are those described *supra*, in the preceding section. *See* also Section 143(b) of Title I (20 U.S.C. 241g(b)).

[518] 45 C.F.R. §116.4(a)(1976). The legislative history of the Education Amendments of 1969 also emphasize the SEA role in providing technical assistance to LEAs for evaluation.. "To a great extent, [LEAs] do not have the expertise to conduct proper program evaluations. [SEAs] should be assisting local schools in organizing evaluation systems. The Office of Education should be requiring the states to do so and providing technical assistance." S. Rep. No. 91-634, 91st Cong. 2nd Sess. 2, reprinted in [1970] U.S. Code Cong. and Adm. News 2776.

Similar concern with the SEA role in providing technical assistance for LEA evaluations was voiced in the legislative history of the Education Amendments of 1974:" [SEAs] in turn should provide the necessary technical assistance to [LEAs] to improve local project evaluation design which will yield the information required which can then be compiled in an acceptable format." H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Cong. and Adm. News 4111.

As explained above, the Title I statute and the regulations emphasize the responsibility of SEAs to provide technical assistance to LEAs for purposes of Title I evaluation. However, it is clear from the legislative history of the Education Amendments of 1969 that Congress also intended SEAs to assist LEAs in planning and developing Title I programs and projects and in meeting Title I requirements. The report of the Senate Committee on Labor and Public Welfare [519] stated that

> As a rule, [LEAs] rely on the [SEAs] for expertise and guidance in meeting the requirements of the law. Since title I makes funds available for State administration of the program, the [SEAs] can and should assist [LEAs] in planning, developing, and evaluating title I programs and projects. (emphasis added).

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[519] S. Rep. No. 91-634, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. and Adm. News. 2775.

Chapter

MONITORING 24

Chapter 24

Monitoring

As explained supra, the SEA is responsible for determining whether a project application submitted by a LEA complies with the program requirements set forth in the Title I legislation and regulations. The purpose of the SEA monitoring function is to ensure that the LEA's Title I program is being implemented in accordance with the design indicated in its application, i.e., in accordance with applicable program requirements.

The GEPA statute [520] requires the SEA to "provide for such methods of administration as are necessary for the proper and efficient administration of the programs to which the general application applies." The regulations implementing this provision explain that SEAs must constantly monitor each function or activity of each grant as set forth in the state approved application to assure that adequate progress is being made toward achieving goals of the grant. Specifically, the regulations [521] provide that

> State agencies shall constantly monitor performance under federally-supported activities to assure that adequate progress is being made towards achieving the goals of the grant. This review shall be made for each function or activity of each grant as set forth in the approved State plan or application.

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[520] Section 434(b)(1)(A)(I) of GEPA (20 U.S.C. 1232c(b)(1)(A)(I)); See also Section 142 of Title I (20 U.S.C. 241f) and 45 C.F.R. §116.4(a)(1976) which provides, in part, that the SEA "...shall be responsible for the proper and efficient performance of the duties of such agency [SEA] under Title I...".

[521] 45 C.F.R. §100b.431(1976).

The importance of SEA monitoring has also been emphasized in the legislative history of Title I. For example, the legislative history of the Education Amendments of 1969[522] explained hat

> The Committee wishes to express its deep concern about the necessity for stronger enforcement of title I requirements by both Federal and State agencies in monitoring the legitimate and effective use of title I funds by local educational agencies. [Emphasis added]

The legislative history of the Education Amendments of 1974,[523] in the course of describing the basic responsibilities of the LEAs and SEAs, explained that

> The heart of the program is that local educational agencies must assess the special needs of their educationally deprived children and must formulate programs to meet those needs with Title I assistance. State educational agencies review and approve the applications submitted by local school districts and then monitor and evaluate their programs. [Emphasis added.]

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[522] S. Rep. No. 91-634, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. and Adm. News 2776.

[523] H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4094. *See* the December 12, 1975 GAO Study, Report to the Congress by the Comptroller General of the United States: Assessment of Reading Activities Under the Federal Program of Aid for Educationally Deprived Children, which cites a need for improved SEA monitoring systems for Title I programs.

Chapter 25

ENFORCEMENT

Chapter 25

Enforcement

I. Introduction

Although the Title I statute expressly requires SEAs to enforce Title I requirements, there is no section in the GEPA or Title I statute or in the Title I regulations which explicitly sets forth the full range of enforcement strategies available to SEAs. However, to the extent that enforcement is related to other SEA functions, e.g., application approval, monitoring and auditing, the Title I legal framework indirectly provides for SEA enforcement in each of these areas.

This chapter will describe (a) the enforcement assurances a SEA must include in its Title I application to the Commissioner, and (b) the enforcement aspects of the SEA application approval, monitoring and auditing functions, and (c) the express and implied authority to withhold or suspend Title I funding.

II. The Requirements for SEA Enforcement

The Title I statute and regulations impose an express obligation on SEAs to enforce Title I requirements. In its application to the Commissioner, a state must give several assurances, including, among other things, assurances related to SEA enforcement.524/ Specifically, the SEA must assure the Commissioner that

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524/ Section 142(a) of Title I (20 U.S.C. 241f(a)). See also §434 of GEPA (20 U.S.C. 1232c).

> (1) it will only approve the expenditure of Title I funds for programs and projects designed by LEAs which meet the program requirements described supra, and 525/
>
> (2) it will enforce compliance with the applicable LEA program requirements. 526/
>
> (3) The SEA will adopt fiscal control and fund accounting procedures to assure the proper disbursement of and accounting for Title I funds. 527/

Thus, a SEA desiring to participate in Title I must provide these enforcement assurances before its application will be approved by the Commissioner.

III. General Provisions Related to SEA Enforcement

A. Application Approval

In accordance with their application approval responsibility, SEAs can enforce Title I requirements by delaying or finally refusing to approve applications that do not meet "all of the applicable requirements of Title I and the regulations." 528/ This enforcement function is subject

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525/ Section 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)); 45 C.F.R. §116.3(a)(2) and (4)(1976). See 45 C.F.R. §116.41(a)(1976).

526/ Id.

527/ Section 142(a)(2) of Title I (20 U.S.C. 241f(a)(2)); 45 C.F.R. §116.3(a)(2)(1976).

528/ 45 C.F.R. §116.5(a)(1976). See chapter on Application Approval, pp. 251 - 253 for a more detailed discussion of this requirement.

to the provisions in the regulations [529] which state that disapproval of a LEA application, in whole or in part, cannot be final without first affording the applicant LEA "reasonable notice" of the reasons for the proposed disapproval and "opportunity for a hearing."

The section of the GEPA statute [530] governing a SEA's application approval function states that a LEA aggrieved by the final SEA disapproval may request a formal hearing by the SEA and review by the Commissioner. [531]

B. Monitoring

In the monitoring phase of program operations, the SEA is required by the GEPA regulations [532] to "constantly monitor performance under federally-supported activities to assure that adequate progress is being made towards achieving the goals of the grant." Thus, the SEA can use its oversight responsibility to approve applications, identify non-complying practices and order their correction, request an audit if necessary or initiate or recommend further enforcement action.

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[529] 45 C.F.R. §116.5(c)(1976).

[530] Section 425(a) of GEPA (20 U.S.C. 1231b-2(a)).

[531] Section 425(b) of GEPA (20 U.S.C. 1231b-2(b)).

[532] 45 C.F.R. §100b.431(1976). See pp. 282 - 283, supra, for a description of the monitoring requirement.

C. Auditing

The auditing requirements set forth in the GEPA regulations[533] impose an obligation on SEAs to conduct audits to determine the "fiscal integrity of...financial transactions and reports and the compliance with applicable [Title I rules]." The enforcement aspect of the SEA auditing responsibility requires that SEAs develop a "systematic method to assure timely and appropriate resolution of audit findings and recommendations."[534]

Normally, if a SEA discovers through "Federal or State administrative reviews and audits or otherwise"[535] that a LEA has misspent Title I funds, the SEA must recoup the amount of the misexpenditure by requesting repayment by the LEA.[536]

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[533] 45 C.F.R. §100b.301(h)(1976). See also §434(a) of GEPA (20 U.S.C. 1232c). The SEA auditing responsibility is described supra, on pp. 271 - 272.

[534] 45 C.F.R. §100b.301(i)(1976).

[535] 45 C.F.R. §100b.53(c)(1976).

[536] In the Education Amendments of 1974, (P.L. 93-380) Congress passed a statute of limitations provision that had implications for enforcement of Title I requirements through audit resolution procedures. The statute provides that "no State or local educational agency shall be liable to refund any payment made to such agency under this Act (including title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized." §804 of Title VIII (20 U.S.C. 884).

The critical point in the operation of the statute of limitations is, as the provision states, when "final written notice" is given. The legislative history is clear on this point: "The Committee intends 'final written notice' to be that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on the audit exception."

D. Withholding and Suspension of Title I Funds

1. Implied Authority

The GEPA statute implies, in part, that SEAs have authority to withhold or suspend funds as a result of LEA noncompliance with Title I requirements.[537] The section of the GEPA statute[538] governing the SEA application approval function states that a LEA aggrieved by final SEA action in "failing to provide funds in amounts in accord with the requirements of laws and regulations, or ...terminating further assistance for an approved program..." may request a hearing with the SEA. In other words, the fact that a LEA can seek review of the SEA failure to provide funds (withhold) or its termination of further assistance (suspend) implies that a SEA has authority to employ these means to enforce its application approval function.

(footnote continued from previous page)

H.R. Rep. No. 93-805, 93d Cong. 2d Sess. 3, reprinted in [1974] U.S. Code Cong. and Adm. News 4160. The legislative history also indicates that the statute of limitations was intended to have retroactive effect (Id.).

In a 1976 interpretation given to a LEA, OE concluded that it would be reasonable to construe the statute of limitations provision as applying with equal force and effect to unauthorized expenditures disclosed by state audits.

[537] SEA authority to recoup misspend funds was discussed on the previous page.

[538] Section 424(a) of GEPA (20 U.S.C. 1231b-2(a)).

2. Express Authority

The Title I legal framework expressly addresses the authority of SEAs to withhold funds for comparability violations.[539] Under the revised regulations[540] a SEA must withhold Title I funds if a LEA's initial comparability report does not demonstrate comparability and a revised report demonstrating comparability is not submitted by December 1. Furthermore, the regulations[541] explicitly state that "no Title I funds may be used to pay for obligations incurred" by a LEA throughout the period during which funds have been withheld. Thus, a LEA can continue a "Title I" program after the SEA has withheld funds if and only if it is willing to fund it through the use of state and local funds.

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[539] The enforcement scheme SEAs must follow where schools serving a Title I project area are non-comparable is described in detail on pp. 210 - 211 .

[540] 45 C.F.R. §116a.26(f)(1)(1976).

[541] 45 C.F.R. §116a.26(f)(4)(1976).

The regulations [542] provide that the withholding of funds shall continue until the LEA files a revised comparability report However, if such a revised report is not filed by March 31, the SEA must finally disapprove the LEA's entire application and it must reallocate unobligated funds to other compliant LEAs. [543] Prior to reallocation, however, the noncompliant LEA is entitled to a hearing. [544]

The regulations [545] also provide that a SEA must withhold funds for Title I projects for those LEAs which have failed to maintain comparability throughout the year and which have not taken "prompt action to correct that lack of comparability."

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[542] 45 C.F.R. §116a.26(f)(1)(1976).

[543] 45 C.F.R. §116a.26(f)(2)(1976).

[544] Id.

[545] 45 C.F.R. §116a.26(f)(3)(1976).

Chapter 26

SEA REPORTING TO THE FEDERAL GOVERNMENT AND COMPLAINT RESOLUTION

SEA Reporting to the Federal Government And Complaint Resolution

I. Introduction

Any state desiring to participate in a grant program under Title I must submit to the Commissioner, through its SEA, an application which provides "satisfactory assurance" that the SEA will give the Commissioner information necessary to enable him to perform his duties under Title I. Specifically, the SEA must provide assurances that it will submit (a) periodic reports evaluating the effectiveness of Title I payments,[546] and (b) other reports as may be "reasonably necessary."[547]

The Title I regulations[548] require that a SEA submit assurances in its annual program plan to the Commissioner that it will comply with the Title I statute and regulations, including the reporting requirements. The GEPA statute[549] contains a similar requirement that states applying for federal programs (including Title I) submit annual program plans containing assurances that reports will be made available to the Commissioner to enable him to carry out his functions.

In accordance with the provisions of the Title I and GEPA statutes and the regulations, the Commissioner has required that, among other reports, the SEA submit (1) an annual evaluation report; (2) complaint resolution reports; (3) comparability

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546/ Section 142(a)(3)(A) of Title I (20 U.S.C. 241f(a)(3)(A)).

547/ Section 142(a)(3)(B) of Title I (20 U.S.C. 241f(a)(3)(B)).

548/ 45 C.F.R. §116.3(a)(1) and (2)(1976).

549/ Section 434(b)(A)(i) and (ii)(III) of GEPA (20 U.S.C. 1232c(b)(1)(A)(i) and (ii)(III); 45 C.F.R. §100b.16-§100b.19(1976).

reports; (4) a report on the use of Federal funds, including Title I; (5) a financial status report regarding administrative and program expenditures, and (6) a state performance report. This section will describe each of these reporting requirements.

II. Annual Evaluation Reports

The SEA annual evaluation report[550] must be submitted to the Commissioner "following the close of each fiscal year and no later than November 15 of the next fiscal year."[551] The purpose of the report is to evaluate the "effectiveness of programs and projects under Title I in meeting the special educational needs of participating children." [552] The Title I statute [553] explains, among other things, that the annual report must include the "results of objective measurements" of educational achievement which are required by the LEA evaluation requirements contained in Section 141(a)(6) of Title I.

In addition to the annual report, the SEA is required to submit two LEA evaluation reports, one of which must be from a LEA whose Title I allocation for the current fiscal year is among the five highest in the State.[554]

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[550] The SEA evaluation responsibility is described *supra*, on pp. 276 - 279.

[551] 45 C.F.R. §116.7(1976).

[552] Id.

[553] Section 142(a)(3)(A) of Title I (20 U.S.C. 241f(a)(3)(A)); 45 C.F.R. §116.43(1976).

While OE has not prescribed the format which SEAs must use for their evaluation reports, [555] a 1972 OE program instruction (Inst. L212.1, June 14, 1972) stated that

> It is expected that the reports... will be submitted in whatever format each State Department of Education determines to be most effective in meeting its evaluation responsibilities.

III. Complaint Resolution

PACs, parents, organizations or members of the general public suspecting that a school district or an individual school may be violating Title I law or regulations, including the pursuit of policies which are inconsistent with the LEA's application, have the right to file a complaint directly with the SEA. The regulations[556] provide general guidance to SEAs for establishing meaningful and effective complaint investigation procedures by requiring:

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[554] 45 C.F.R. §116.7(1976).

[555] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); See also §151 of Title I (20 U.S.C. 241o) which describes OE's responsibility to provide SEAs with evaluation procedures and criteria.

A 1972 OE program instruction (Inst. L212.1, June 14, 1972) suggested the type of information which SEAs should include in their evaluation reports. The directive suggested that one section of the report "present summation of the academic achievement of participating children supported by hard data, analysis of the achievement data, and program recommendations based on these analyses."

It was suggested that another section might include "statistical types of information such as kinds and extent of instructional activities, supportive services, parental involvement, public, and non-public school children's participation, numbers and categories of state employed, and nature and extent of inservice training provided."

- Specific time limits--normally no longer than 60 days--to investigate and resolve complaints,
- An opportunity for complaining parties to present evidence to the SEA, and
- Distribution of information about state complaint investigation procedures to interested parties, including PACs.

In addition, the regulations[557] require that the SEA prepare certain reports pertaining to complaints filed with it. The following reports are required:

(1) Interim reports. Where the complaint has not been fully investigated and resolved within 60 days, the SEA shall report to the Commissioner on the substance of the complaint and its status;

(2) Final Reports. Where a complaint has been fully investigated, the SEA shall submit a report to the Commissioner which includes, at a minimum, the substance of any allegation and the name of the individual, private organization or LEA making the allegation, a summary of the results of the investigation and any hearings held and a statement of the disposition of the complaint and the reasons for such disposition.

556/ 45 C.F.R. §116.6(1976). It is important to note that nothing in these regulations prevents an SEA from including, in its complaint investigation procedure, informal attempts to resolve complaints at the local level. However, to the extent the SEA utilizes informal methods of complaint resolution, the regulations require that the 60-day period begin to run as of the date the complaint is first filed with the LEA, not the date the SEA begins its investigation.

557/ 45 C.F.R. §116.7(b)(1)(2)(1976).

In addition to sending its report to the Commissioner, the SEA must also send copies to the appropriate applicant agency and the complainant.[558]

IV. Comparability Reports

The Title I regulations include specific recordkeeping requirements pertaining to comparability of services between project and non-project area schools. Specifically, the regulations [559] generally provide that by January 1 of each year, the SEA must submit to the Commissioner "a copy of the comparability report for each [LEA] in the State which the Commissioner has determined to be in a national sample of such agencies for that year."

Furthermore, the SEA must submit to the Commissioner by January 1 of each year a report identifying each LEA that failed to meet the Title I comparability requirements. Such reports must indicate for each non-complying LEA either:

> that such [LEA] has allocated or reallocated sufficient additional resources to Title I project areas so as to come into compliance with such requirements and has filed a revised comparability report reflecting such compliance or...that the [SEA] is withholding the payment of Title I funds to the non-complying complying [LEA]. [560]

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[558] 45 C.F.R. §116.7(b)(3)(1976).

[559] 45 C.F.R. §116a.26(n)(1)(1976). See Chapter 13 for a discussion of comparability requirements.

[560] 45 C.F.R. §116a.26(n)(2)(i)(ii)(1976). A copy of each revised comparability report must be included with the SEA report submitted to the Commissioner by January 1. 45 C.F.R. §116a.26 (n)(4)(1976).

Not later than April 30 of each year, the SEA must report to the Commissioner whether any of the non-complying LEAs have come into compliance, and, if so, must submit, for each such LEA, a revised comparability report reflecting compliance.[561]

V. Report On The Use Of Federal Funds

The GEPA statute,[562] requires that, within sixty days after the end of the fiscal year, a SEA submit a report on the uses of Federal funds, including for Title I. The report must contain the following information:[563] (a) list of all grants to LEAs and other state agencies and institutions during the fiscal year; (b) the total amount of funds available to the state under each applicable program and from which appropriation Act(s) these funds were available; (c) with respect to the second preceding fiscal year, a list of reports from LEAs and other state agencies and institutions indicating the amount of Federal funds received by each agency and the purposes for which the funds were expended; and (d) with respect to the second preceding fiscal year, a statistical report on those persons served or affected by programs or projects receiving Federal monies.

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[561] 45 C.F.R. §116a.26(n)(4)(1976).

[562] Section 437(a) of GEPA (20 U.S.C. 1232f(a)).

[563] Section 437(a)(1)(2)(3) and (4) of GEPA (20 U.S.C. 1232f(a)(1)(2)(3) and (4)).

The statute [564] also requires that such reports be made available to LEAs, other state agencies and institutions and to the public.

VI. Financial Status Report

SEAs are required to submit Financial Status Reports on the status of funds for all non-construction grant programs.[565] This report generally contains summary information regarding such areas as total amount of federal funds authorized, total program outlays for the period, and unobligated balance of federal funds.[566] Each SEA shall report the above information for all grants, including Title I, on the same accounting basis which it uses in maintaining its accounting records.[567]

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[564] Section 437(a)(5) of GEPA (20 U.S.C. 1232f(a)(5)).

[565] 45 C.F.R. §100b.403(a)(1976).

[566] 45 C.F.R. §100b.403(b)(1976). ESEA Title I Program Directive INST. A-310-3 (December 4, 1975). OE Form 380-1 (September, 1975) identifies the categories of information which must be included: state administration, Part A grants to LEAs (Basic Grants), Part B grants to LEAs (Special Incentive (grants), Part C grants to LEAs (Special grants), grants to SEAs for migratory children, and grants to SEAs for handicapped children.

[567] 45 C.F.R. §100b.403(b)(1976).

For research project grants, Financial Status Reports shall be submitted annually, 90 days after the end of the grant year. A final report must be submitted 90 days after termination of Federal support.[568]

For other types of grants, the frequency of reports shall be prescribed by the Commissioner but shall be submitted at least once annually and at most quarterly. Reports required on a quarterly or semi-annual basis must be submitted 30 days after the end of a specified reporting period. A final report is required 90 days after termination of Federal support.[569]

The Commissioner may choose to waive the Financial Status Report requirement when the Request for Advance or Reimbursement (see §100b.405) provides adequate information to meet his needs. When the Request for Advance or Reimbursement form is used only for advances, a final Financial Status Report is required at the completion of the grant.[570]

VII. State Performance Report

SEAs are required to submit performance reports along with

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[568] 45 C.F.R. §100b.403(c) and (d)(1976).

[569] 45 C.F.R. §100b.403(c)(1976).

[570] 45 C.F.R. §100b.403(d)(1976).

Financial Status Reports.[571] Performance reports must contain the following information:[572]

> (1) A comparison of actual accomplishments to the goals established for the period. Where the output of projects can be readily quantified, such quantitative data shall be related to cost data for computation of unit costs,
>
> (2) Reasons for slippage in thos cases where established goals were not met,
>
> (3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

There are two exceptions to the general policy that performance reports be submitted with Financial Status Reports. First, where the Commissioner determines that sufficient performance information is contained in continuation or renewal applications, the SEA must submit a performance report only with the final

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[571] 45 C.F.R. §100b.432(b)(1976).

[572] 45 C.F.R. §100b.432(c)(1)(2) and (3)(1976). ESEA Title I Program Directive INST. A310-3 (December 4, 1975). OE Form 380-2 identifies the information which must be contained in the performance reports: the total number of residents in the school district, the total in project areas, the number of children who participated in Title I programs, the number of participants who received instructional and service activities in Title I programs, the number of children who participated in Title I programs by racial/ethnic group, the total number (FTE) of staff

Financial Status Report.[573]

Second, when the request for Advance or Reimbursement form is used in lieu of the Financial Status Report (see preceding section), the Commissioner will prescribe the frequency with which performance reports must be submitted. In such cases, reports will be required at least once annually and at most quarterly.[574]

(footnote continued from previous page)

members assigned to Title I programs and number of parents of Title I participants who participated in district and school advisory committees and in Title I program activities.

[573] 45 C.F.R. §100b.432(a)(1976).

[574] 45 C.F.R. §100b.432(b)(1976).

Part IV

ADMINISTRATIVE FUNCTIONS PERFORMED BY THE UNITED STATES OFFICE OF EDUCATION

PART IV

ADMINISTRATIVE FUNCTIONS PERFORMED BY THE UNITED STATES OFFICE OF EDUCATION

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Part IV

INTRODUCTION AND OVERVIEW

PART IV

ADMINISTRATIVE FUNCTIONS PERFORMED BY THE UNITED STATES OFFICE OF EDUCATION UNDER TITLE I

INTRODUCTION

The Title I legal framework provides that the United States Office of Education (OE)[575] through the Commissioner of Education (Commissioner)[576] is required to perform certain administrative functions to assure, among other things, that Title I funds are spent in a manner consistent with the LEA and SEA requirements contained in the Title I and GEPA legislation and regulations. The purpose of this section of the paper is to describe the most important administrative functions the Commissioner is required to perform as generally contained in the Title I and GEPA statutes and regulations.

These functions include: (a) development of regulations; (b) grant distribution; (c) application approval; (d) monitoring; (e) technical assistance, evaluation and information dissemination; (f) enforcement; and (g) reporting to Congress.

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[575] Section 403(a) of GEPA (20 U.S.C. 1221c(a)) defined OE as "the primary agency of the Federal Government responsible for the administration of programs of financial assistance to educational agencies, institutions, and organizations".

[576] The Commissioner of Education heads OE. He/she is appointe by the President with the consent of the Senate. The Commissioner is subject to the direction and supervision of the Secretary of DHEW.

Chapter 27

DEVELOPMENT OF REGULATIONS

Chapter 27

Development of Regulations

Section 432 of GEPA (20 U.S.C. 1232a) generally provides that no provisions of Title I

> shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system....

This provision does not, however, prohibit the Commissioner from establishing "basic criteria". The Commissioner's authority to establish "basic criteria" was included in the original Title I legislation. The purpose of this grant of authority is to define and clarify Section 141(a) of Title I (20 U.S.C. 241e(a)) (LEA application requirements) and also to assist "State and local educational agencies in carrying out Title I and to assure" a reasonably uniform application of its provisions throughout the nation." 577/

Section 431 of GEPA (20 U.S.C. 1232) contains detailed requirements governing the promulgation of regulations 578/ regarding the administration of federal education programs, including Title I.

577/ S. Rept. No. 146, 89th Cong., 1st Sess. 1, reprinted in [1965] U.S. Code Cong. and Adm. News 1454.

578/ The 1976 Education Amendments defined the term "regulation" as "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner". This definition is now incorporated in Section 431(a)(1) of GEPA (20 U.S.C. 1232(a)(1)).

The most important requirements set forth in the GEPA statute are: (a) each "regulation must include "citations to the section or sections of satutory law or other legal authority upon which such provision[s] [are] based;"[579] (b) all Title I regulations must first be published in the Federal Register as proposed regulations;[580] (c) during the 30 day period following this publication, the Commissioner must offer interested persons an opportunity to comment upon the "proposed regulation;"[581] (d) if the agency decides to adopt a regulation as final, it must republish the regulation in the Federal Register;[582] (e) all final regulations must be uniformly applied and enforced throughout the fifty states;[583] and (f) concurrent with the publication of any "final regulation" in the Federal Register, the Commissioner must transmit a copy of such to Congress. "Final regulations" will "become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the [final regulation] is inconsistent with the Act from which it derives its authority...". [584]

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[579] Section 431(a)(2) of GEPA (20 U.S.C. 1232(a)(2)).

[580] Section 431(b)(1) of GEPA (20 U.S.C. 1232(b)(1)).

[581] Section 431(b)(2)(A) of GEPA (20 U.S.C. 1232(b)(2)(A)).

[582] Section 431(d)(1) of GEPA (20 U.S.C. 1232(d)(1)).

[583] Section 431(c) of GEPA (20 U.S.C. 1232(c)).

Section 421A(c)(2)(A) of GEPA (20 U.S.C. 1231(c)(2)(A)) and the regulations issued thereunder [585] generally prohibit OE officials or employees from waiving any provisions of the Title I regulations or statute. More specifically, OE may not promulgate regulations waiving requirements or conditions imposed by the Title I statute, "unless such a waiver or modification is expressly authorized by such law or by a provision of this title or by a law expressly limiting the applicability of this paragraph."

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[584] Section 431 (d)(1) of GEPA (20 U.S.C. 1232(d)(1)). Failure on the part of Congress to act within the 45-day period should not be construed as an approval or a finding of consistency with the Act for purposes of any judicial proceeding. Id, as amended by P.L. 94-142.

[585] 45 C.F.R. §100b.483(1976).

Chapter 28

GRANT DISTRIBUTION

Chapter 28

Grant Distribution

In accordance with the terms of the Title I legislation,[586] the Commissioner is authorized to make payments to SEAs "for grants made on the basis of entitlements created under this title." In addition, the Commissioner is responsible for determining LEA maximum grants that make up State entitlements according to the Title I statutory grant formula and available "satisfactory data." [587] Once State entitlements are determined, the Commissioner must pay to each State "in advance or otherwise, the amount which it and the local educational agencies of that State are eligible to receive under this title." [588]

From the funds paid to it, each SEA distributes to each LEA whose application the SEA has approved "the amount for which such application has been approved." [589]

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[586] Section 102 of Title I (20 U.S.C. 241b).

[587] Section 103(a)(2) of Title I (20 U.S.C. 241c(a)(2)); 45 C.F.R. §116a.5(a)(1976). See p.19n.25 , *supra*, for a description of the Title I formula. If satisfactory data are not available on a LEA level, the Commissioner must determine county level maximum grants. The SEA in turn is responsible for determining sub-county grants for LEAs according to the best available data. *Id*.

[588] Section 143(a)(1) of Title I (20 U.S.C. 241g(a)(1)); 45 C.F.R. §116.17(1976). See also Section 435 of GEPA (20 U.S.C. 1232d) and 45 C.F.R. §100b.62(1976).

[589] Section 143(a)(2) of Title I (20 U.S.C. 241g(a)(2)). For a description of State responsibilities in grant distribution, see pp. 259 - 265 , *supra*.

There are two restrictions on payment to SEAs and LEAs specified in the Title I statute. First, the Commissioner must not make payments under Title I to a State which has taken into considertion payments under Title I in determining the eligibility of a LEA in that State for State aid, or the amount of that aid. 590/

Second, the Commissioner must not make payments to LEAs unless the SEA finds that the

> combined fiscal effort...of [the LEA] and the State with respect to the provision of free public education...for the preceding fiscal year was not less than such combined fiscal effort for that purpose for the second preceding fiscal year." 591/

Under Section 411 of GEPA (20 U.S.C. 1223), Title I appropriations are "authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are available for obligation." The purpose of this section is to afford State and local officials adequate notice of available Federal financial assistance to adequately plan Title I programs and projects. 592/

590/ Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.18(1976).

591/ Section 143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); 45 C.F.R. §116.19(1976).

592/ See S. Conference Report No. 1049, 90th Cong., 1st Sess. 2 reprinted in [1967] *U.S. Code Cong. and Adm. News* 2832; House Report No. 93-1211. 93rd Cong., 2nd Sess. (1974) at p. 200.

Chapter 29

APPLICATION APPROVAL

Chapter 29

Application Approval

Any State desiring to participate under Title I must submit, through its SEA, a general application which includes assurances that the State will meet certain minimum requirements [593] and an annual program plan.[594] The Commissioner must approve an application or annual State plan which meets the applicable requirements and must not finally disapprove an application or annual State plan except after reasonable notice and opportunity for a hearing.[595]

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[593] Section 434(b)(1)(A) of GEPA (20 U.S.C. 1232c(b)(1)(A)); 45 C.F.R. §100b.17(1976) and Section 142(a) of Title I (20 U.S.C. 241f(a)). See supra, for a description of assurances which must be contained in the SEA application. In addition to this general application, the SEA must submit applications for statewide Title I programs which it administers e.g., programs for migrants. This paper does not describe such program requirements.

[594] Sections 434(b)(1)(A) and (B) GEPA (20 U.S.C. 1232c (b)(1)(A) and (B); 45 C.F.R. §100b.18(1976).

[595] Section 142(b) of Title I (20 U.S.C. 241f(b)); See also Sections 425(b) and (d) of GEPA (20 U.S.C. 1231b-2(b) and (

Chapter 30

MONITORING AND AUDITING

Chapter 30

Monitoring and Auditing

Under the present legal framework, SEAs are responsible for overseeing day to day operations of LEA Title I programs and projects. However, OE is ultimately responsible for ensuring the appropriateness of Title I programs and expenditures thereunder.[596]

The GEPA regulations[597] provide that site visits will be made by representatives of DHEW or the Commissioner as frequently as practicable to "(a) Review program accomplishments and management control systems, and (b) provide such technical assistance as may be required." Furthermore, the records of a recipient of Title I funds are subject to "audit by the Federal Government to determine whether the recipient has properly accounted for Federal funds."[598]

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[596] Section 146 of Title I (20 U.S.C. 241j); Section 434(c) of GEPA (20 U.S.C. 1232c(c)).

[597] 45 C.F.R. §100b.436(1976).

[598] 45 C.F.R. §100b.484(1976).

Chapter 31

TECHNICAL ASSISTANCE, EVALUATION, AND INFORMATION DISSEMINATION

Chapter 31

Technical Assistance, Evaluation and Information Dissemination

The Commissioner is generally authorized, and with respect to evaluation, expected, to provide technical assistance to SEAs and, with the approval of SEAs, to elementary and secondary schools.[599]

These general technical assistance responsibilities include, among other things, assisting SEAs in determining benefits available under Title I;[600] in preparing applications,[601] and in meeting applicable Title I requirements.[602] The objective of the technical aid requirement is to enhance the quality of Title I programs or broaden the scope of Title I activities.[603] A related objective is to encourage the simplification of administrative procedures, e.g., applications and evaluations.[604]

The Title I legislation expressly links the technical assistance requirement with evaluation. Specifically, the statute [605] provides that

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[599] Section 426 of GEPA (20 U.S.C. 1231c), Section 143(b) of Title I (20 U.S.C. 241g(b)); Section 151(e) of Title I (20 U.S.C. 241o(e)).

[600] Section 426(a)(1) of GEPA (20 U.S.C. 1231c(a)(1)).

[601] Section 426(a)(2) of GEPA (20 U.S.C. 1231c(a)(2)).

[602] Id.

[603] Section 426(a)(3) of GEPA (20 U.S.C. 1231c(a)(3)).

[604] Section 426(a)(4) of GEPA (20 U.S.C. 1231c(a)(4)).

> The Commissioner shall provide such technical and other assistance as may be necessary to State educational agencies to enable them to assist local educational agencies in the development and application of a systematic evaluation of programs in accordance with the models developed by the Commissioner.

The Title I legislation identifies specific requirements the Commissioner must meet to satisfy his responsibility to provide aid to LEAs and SEAs for purposes of Title I evaluation. The most important requirements are set forth below.

First, the Commissioner must provide for "independent evaluations which describe and measure the impact" of Title I programs and projects. The evaluations must include opinions obtained from program participants about the strengths and weaknesses of such programs. [606] Second, the Commissioner must "develop and publish standards for evaluation of program or project effectiveness in achieving the objectives" of Title I. [607] Third, the Commissioner must provide to SEAs, models for evaluations of "all" Title I programs,

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[605] Section 151(e) of Title I (20 U.S.C. 241o(e)). See also Section 417 of GEPA, (20 U.S.C. 1226c).

[606] Section 151(a) of Title I (20 U.S.C. 241o(a)).

[607] Section 151(b) of Title I (20 U.S.C. 241o(b)).

> which shall include uniform procedures and criteria to be utilized by local educational agencies, as well as by the State agency in the evaluation of such programs. [608]

These evaluation models must specify "objective criteria" and outline "techniques...and methodology...for producing data which are comparable on a statewide and nationwide basis."[609]

Fourth, the Commissioner must "develop a system for the gathering and dissemination of results of evaluations and for the identification of exemplary programs...and for the dissemination of information concerning such programs." [610]

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[608] Section 151(d) of Title I (20 U.S.C. 241o(d)).

[609] Section 151(f) of Title I (20 U.S.C. 241o(f)).

[610] Section 151(h) of Title I (20 U.S.C. 241o(h). See Section 422(a)(1) of GEPA (20 U.S.C. 1231a(a)(1)).

Chapter 32

ENFORCEMENT

Chapter 32

ENFORCEMENT

I. Introduction

The Commissioner is responsible for enforcing the requirements of the Title I and GEPA statutes and regulations. In general, he/she must withhold or suspend Title I funds upon a finding that there has been a failure to substantially comply with any assurance contained in a state application or annual plan. In addition, the Commissioner must recoup misspent funds when a final aduit determination has been entered. These requirements are described below.

II. Withholding and Suspension of Title I Funds

The Title I legislation [611] and regulations[612] set forth mandatory requirements concerning the withholding of Title I funds by the Commissioner. Section 146 of Title I provides:

> Whenever the Commissioner, after reasonable notice and opportunity for a hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State...the Commissioner shall notify the agency that further payments will not be made to the State under [Title I] (or, in his discretion, that the State educational agency shall not make further payments under [Title I] to specified local educational agencies affected by the failure) until he is satisfied that

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[611] Section 146 of Title I (20 U.S.C. 241j).

[612] 45 C.F.R. §116.20(1976).

> there is no longer any such failure to comply. Until he is so satisfied that no further payments shall be made to the State under [Title I], or payments by the State educational agency under [Title I] shall be limited to local educational agencies not affected by the failure, as the case may be." [emphasis added]

Prior to initiating a hearing, the Commissioner must attempt to resolve apparent differences between OE and the SEA regarding the interpretation or application of any Title I program requirements. 613/

Section 434(c) of GEPA contains a general withholding provision which is, in part, comparable to the Title I withholding provision set forth above. In addition, this section of GEPA authorizes the Commissioner, *at his discretion*, to *suspend payments* to the non-complying SEA pending the outcome of any termination proceeding "after such recipient has been given reasonable notice and opportunity to show cause why such action should not be taken."

The Commissioner may exercise his/her authority to withhold or suspend Title I funding at various stages in the life of the program. For example, the Commissioner may refuse to approve a state's annual program plan 614/ or he/she may revoke approval based on information obtained during a monitoring visit or in the course of investigating citizen complaints. 615/

613/ Id.

614/ Section 146 of Title I (20 U.S.C. 241j); See also Section 434(c) of GEPA (20 U.S.C. 1232c(c).

615/ 45 C.F.R. §116.20(1976); 45 C.F.R. §100b.482(1976).

III. Audit Resolution

The authority and responsibility for federal audits of Title I programs are vested in the HEW Office of Inspector General [616] and are exercised by the Assistant Inspector General for Auditing.[617]

Once a Title I audit has been completed and a final determination letter issued,[618] SEAs may elect to pursue one of two alternatives:

1. If the SEA accepts the final determination and takes appropriate corrective action and/or makes repayment, the matter is settled.

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[616] Section 203(a)(1) of P.L. 94-505 (42 U.S.C. 3523(a)(1)). Section 206(a)(1) of P.L. 94-505 (42 U.S.C. 3526(a)(1)) transferred to the Office of Inspector General the functions, powers, and duties of the HEW Audit Agency.

[617] Section 202(e)(1) of P.L. 94-505 (42 U.S.C. 3522(e)(1)).

[618] In 1974 Congress enacted a statute of limitations provision which applies to Title I audit resolution. The statute provides that:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized (Section 804 of ESEA (20 U.S.C. 884).

The legislative history explains that "final written notice" is

> that notice which is given after the state or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on that audit exception. (H.R. Rep. No. 93-805, 93rd Cong., 2d Sess., 79 (1974)).

2. If the SEA does not accept the final determination, it may, in most instances, request a hearing before the Title I Audit Hearing Board. [619]

The Title I Audit Hearing Board has been established within the Office of Education to review, upon appropriate application, final Title I audit determinations made by OE after June 30, 1971. [620] Such Audit determinations are considered final only after the grantee has been provided

> the opportunity to furnish documentation or otherwise comment on a [HEW Audit Agency] audit report, or preliminary determination and has been notified in writing that a final audit determination has been made with respect to the matters included in a final audit report and regarding implementation of the items contained therein. [621]

The Title I Audit Hearing Board has jurisdiction in those cases in which a Title I grantee (1) has been notified in writing that a final audit determination has been made that an expenditure of Title I funds not allowable under Title I has been made by the grantee or subgrantee or (2) that the grantee or subgrantee has otherwise failed to discharge its obligations to account for grant funds.[622] The written notice of the final audit determination must (1) inform the grantee of the opportunity to apply for review of the determination and (2) set forth the reasons for the determination in sufficient detail to enable the grantee, in its application for review , to (a) identify clearly the question or questions in dispute and (b) include a "full statement of the grantee's position with respect to the question or questions, and the pertinent facts and reasons in support of this position".[623]

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[619] These alternatives were described in an October, 1974 memorandum from the Commissioner to the Chief State School Officers and became effective as of that date.

[620] 37 FR 23002 (October 27, 1972) as amended by 41 FR 28658 (July 12, 1976).

[621] §1, 41 FR 28568 (July 12, 1976).

If an application for review is accepted, the application is referred to an Audit Hearing Panel which must act in accordance with certain substantive and procedural rules.[624] Following a hearing, the Audit Hearing Panel must prepare an initial written decision, including findings of facts and conclusions for submission to the Commissioner.[625] Parties or intervenors then have an opportunity to submit written comments on the initial decision to the Commissioner.[626]

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[622] §4(a), 41 FR 28568 (July 12, 1976).

[623] §5(a), §2 and §4(b), 41 FR 28568-28569 (July 12, 1976).

[624] §7, 41 FR 28569 (July 12, 1976).

[625] §9(a), 41 FR 28569 (July 12, 1976).

[626] §9(b), 41 FR 28569 (July 12, 1976).

The initial decision of the Audit Hearing Panel becomes the final decision of the Commissioner "unless within 25 days after the expiration of the time for receipt of written comments, the Commissioner signifies his determination to review the decision.[627]

If the Commissioner exercises his discretion to review the initial decision and modifies or reverses it, he must "accompany this action by a written statement of the grounds for modification or reversal, which shall promptly be filed with the Board".[628] This decision of the Commissioner does not become final until it is served upon either the grantee or its counsel.[629]

If the Commissioner determines that misexpended funds must be repaid, then he/she must initiate administrative collection procedures.[630]

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[627] §9(c), 41 FR 28569 (July 12, 1976). The authority to review initial decisions may not be delegated by the Commissioner and the review must be based "upon the decision, with written record of the Panel's proceedings, and written comments or oral arguments by the parties to the proceeding, or by their counsel" (§9(e)).

[628] §9(d), 41 FR 28869 (July 12, 1976).

[629] Id.

[630] Section 3 of the Federal Claims Collections Act of 1966 (31 U.S.C. §952); 4 C.F.R. §§102.1-102.12(1976); 45 C.F.R. §§30.1-30.3(1976).

Chapter 33

REPORTING TO CONGRESS

Chapter 33

Reporting to Congress

The Commissioner of Education is required by GEPA to transmit to appropriate Congressional committees, not later than November 1 of each year, an annual evaluation of the effectiveness of Title I in meeting its legislated purposes.[631] The report must include a survey of how many children counted in the determination of state entitlements are participating in Title I programs and projects and how many are not, how many educationally deprived children are participating in Title I programs and how many are not.[632]

Furthermore, the GEPA statute[633] requires that the Commissioner, not later than March 31 of each year, submit an annual report including, among other things, the activities of the National Advisory Council on the Education of Disadvantaged Children,[634] developments in administration, utilization and impact of Title I,[635] and results of investigations and activities of OE.[636]

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[631] Section 417(a)(1) of GEPA (20 U.S.C. 1226c(a)(1)).

[632] Section 417(a)(2) of GEPA (20 U.S.C. 1226c(a)(2)).

[633] Section 422(b) of the GEPA (20 U.S.C. 1231a(b)(4)).

[634] Section 448(a) of GEPA (20 U.S.C. 1233g(a)).

[635] Section 422(a)(4) of GEPA (20 U.S.C. 1231a(a)(4)).

[636] Section 422(a)(4)(C) of GEPA (20 U.S.C. 1231a(a)(4)(C)).

The Title I legislation[637/] also requires that the Commissioner report to appropriate Congressional committees, not later than February 1 of each year, his progress in carrying out the evaluation requirements contained in Section 151 of Title I.

[637/] Section 151(g) of Title I (20 U.S.C. 241o(g)).